Central Law Journal.

ST. LOUIS, MO., JUNE 6, 1902.

REVOCATION OF CHECK BY DEATH OF DRAWER.

On the interesting question of the revocation of a check by the death of the drawer the authorities are very meager. We are therefore inclined to give special prominence to the recent case of Weiand's Administrator v. State National Bank, 65 S. W. Rep. 618, where the Court of Appeals of Kentucky distinctly held that the death of the drawer operates as a revocation of a check, so that if the bank pays it after notice of that fact, it does so at its peril. The only direct authority for this holding is to be found in the position assumed by several prominent text writers, principally Morse on Banking, who lays down the rule as follows: "If the drawer has revoked the order before the bank has made payment or bound itself to pay, it must not pay; nor if the drawer is insane, nor if the drawer is dead, not being a corporation or firm." Of course, in cases of the death or insanity of the drawer, knowledge of that fact must be brought home to the bank before it has paid the check or has become bound for it. This same statement of the law is made in 2 Edw. Bills & Notes, § 739. The only case which seems to sustain the law as thus announced is that of Tate v. Hilbert, 2 Ves. Jr. 118.

We cannot say that we approve the rule thus announced. It injects an element of too much uncertainty into one of the most common transactions of modern business life. It has been estimated that three-fourths of the credit transactions of the United States are represented by commercial paper in the form of checks. They have certainly become a very popular medium of exchange, and deserve to have added to them every element of certainty that is possible to attribute to them. If the uncertainty of the maker's death is to be permitted to invalidate obligations of this character, their usefulness as a medium of exchange will be seriously impaired. If such is the rule at common law, the more quickly it is changed by statute the better it will be for the business interests of the country.

RIGHT TO INJUNCTION IN CASE OF BREACH OF CONTRACT FOR PERSONAL SERVICES.

Whether a prohibitory injunction can be invoked to prevent the breaking of a contract for personal services or to assist in its negative enforcement is one of the most interesting questions in modern jurisprudence. Ever since the celebrated English case of Lumley v. Wagner, the rule has been stated to be that in contracts for personal services where special and extraordinary skill or ability is involved, as, for instance, in cases of authors or opera singers of great renown, a court of equity, while powerless to compel performance, will, in case of an attempted breach of such contract, prevent the defaulting party from profiting by his perfidy and close every avenue of usefulness in that particular direction against him until he has honorably performed or been released from his obligation. It is of course true that in this country at least the courts have not been anxious to extend the operation of this rule, but it has been only in a recent class of cases that a new argument has been advanced against the operation of the rule at all in this country,—the constitutional objection that it enforces involuntarily servitude. The cases referred to arose in the recent litigation between certain clubs of the National Base Ball League and certain players of that association who broke their contracts for the season of 1902 and attempted to hire their services to a rival organization. The first of these cases arose in Philadelphia, the outcome being unfavorable to the contention of the players sought to be enjoined. Philadelphia Ball Club v. La Joie, reported on page 446 of this number of the JOURNAL. Following this case, similar litigation involving identically the same contracts arose in the circuit court of St. Louis in the case of American Base Ball and Athletic Co. v. Harper. The opinion in this case by Talty J., we also publish in this issue immediately following the Pennsylvania case. In this latter case, for the first time, the question of involuntary servitude is considered as a coustitutional defense to the issuance of an injunction in this class of cases. Considering the great importance of this question we are fortunate in being favored with an exhaustive analysis and annotation of both these cases by

Prof. John D. Lawson of the Missouri State University, and in view of the high practical value and interest that attaches to this question, it will be quite unnecessary to urge upon any discerning lawyer or jurist its most careful consideration.

NOTES OF IMPORTANT DECISIONS.

NUISANCES—RIGHT OF MUNICIPALITY TO DECLARE THE KEEPING OF A JACKASS A NUISANCE.—Every day adds constantly increasing testimony to the fact that in the cities the liberties of the people are being rapidly curtailed. We cannot say, however, that this is not one of the necessities of city life as it exists to-day in all its complexity. In regard to nuisances, the rules has been and is to-day well settled that the authority to prevent and abate nuisances conferred upon a municipality does not permit it to declare that a nuisance which is not so in fact. The difficulty, however, lies in the fact that the courts hesitate to disturb the discretion of municipal assemblies in branding certain things as nuisances. Many kinds of business, for instance, might easily be considered a nuisance in a large city which would be perfectly legitimate in more rural districts. On this principle the court rested its decision in the recent case of *Ex parte* Foote, 65 S. W. Rep. 706 in which the the Supreme Court of Arkansas held that under a statute which invests municipal corporations with power to prevent annoyance within their limits, to abate nuisances, and to enact ordinances to carry into effect such power, and "to improve the morals, order, comfort and convenience of their inhabitants," a town may enact an ordinance prohibiting the keeping of a jackass within its limits in hearing distance of its populace, and declaring such keeping to be a nuisance. The court says: "As a rule, a jack is kept for one purpose only, and that is propagation of his own species and mules. He has a loud, discordant bray, and, as counsel say, frequently "makes himself heard regardless of hearers, occasions, or solemnities. He is not a desirable neighbor. The purpose for which he is kept, his frequent and discordant brays, and the associations connected with him, bring the keeping of him in a populous city or town within the legal notion of a nuisance."

STREET RAILROADS—CONTRIBUTORY NEGLIGENCE OF PASSENGER RIDING IN A PLACE OF DANGER.—The electric street railway may be the juggernaut of modern times, but it is not always ruthless in the injuries which it occasions nor indeed always at fault. The prejudices of the injured passenger often blinds him to the fact that his own gross negligence has contributed most proximately to his injury. In the recent case of Neiboer v. Detroit Electric Railway, 87 N. W. Rep. 626, the Supreme Court of Michigan held that a person riding on the bumper of a street car after being warned by the conductor of his dangerous position is guilty of contributory negligence, as a matter of law, so as to prevent recovery for injuries occasioned by being struck from the rear by another car.

The court is clear and emphatic in its statement of the law on this question: "Plaintiff involuntarily, and without invitation or permission, chose to ride in a dangerous place, rather than attempt to get inside or to wait a few minutes for another car. His negligent act was a continuing one, and directly contributed to the injury. When a place is one not provided or intended for passengers to ride upon, and is in itself dangerous, the employee who assumes to permit a passenger to ride in such a place acts without authority, unless such authority be shown expressly or by common custom."

This case comes within the principle established by the following authorities: Chamberlain v. Railroad Co., 11 Wis. 238; Jackson v. Crilly, 16 Colo. 103, 26 Pac. Rep. 331; Railroad Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Carroll v. Transit Co., 107 Mo. 653, 17 S. W. Rep. 889; Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Bard v. Traction Co., 176 Pa. 97, 34 Atl. Rep. 954, 53 Am. St. Rep. 672. The last case is the parallel of this in its facts, except that the conductor in that case did not know that the plaintiff was standing upon the bumper.

WILLS—EFFECT OF MARRIED WOMEN'S ACTS ON RULE REVOKING WILL OF UNMARRIED FEMALE ON HER MARRIAGE.—Is the rule that a will of an unmarried female is deemed revoked by her subsequent marriage, affected by legislation removing the disabilities of married women? One phase of this interesting question is considered in the recent case of *In re* Booth's Will, 66 Pac. Rep. 710. In this case it appeared that the statutes of Oregon provided that the will of an unmarried woman should be deemed revoked by her subsequent marriage. The exact holding of the court was that this statute was not repealed by a subsequent enactment, removing the common-law disabilities of married women, and vesting them with complete control of their property.

This question has become highly important because of the fact that recent legislation of a similar character has been adopted in many states in this country. In regard to the particular question here involved, however, it has been generally held that the effect of such legislation is to abrogate and annul the common-law rule, because it removes the reason upon which it was founded, and substitutes an entirely new principle and policy. Chapman v. Dismer, 14 App. D. C. 446; Appeal of Emery, 81 Me. 275, 17 Atl. Rep. 68; Noyes v. Southworth, 55 Mich. 173, 20 N. W. Rep. 891, 54 Am. Rep. 359; Fellows v. Allen, 60 N. H. 439, 49 Am. Rep. 328; *In re* Ward's Will, 70 Wis. 251, 35 N. W. Rep. 731, 5 Am. St.

Rep. 174; Roane v. Hollingshead, 76 Md. 369, 25 Atl. Rep. 307, 17 L. R. A. 592, 35 Am. St. Rep. 438; Webb v. Jones, 36 N. J. Eq. 163; *In re* Tuller's Will, 79 Ill. 99, 22 Am. Rep. 164.

The court in the present case, however, while recognizing the above rule insists that such legislation cannot be held to repeal a positive statute declaring that a will made by an unmarried woman shall be deemed revoked by her subsequent marriage. The court is upheld in this contention by the following authorities: Loomis v. Loomis, 51 Barb. (N. Y.) 257; *In re* McLarney's Will, 153 N. Y. 416, 47 N. E. Rep. 817, 60 Am. St. Rep. 664; Swan v. Hammond, 138 Mass. 45, 52 Am. Rep. 255; *In re* Fransen's Will, 26 Pa. 202; *In re* Craft's Estate, 164 Pa. 520, 30 Atl. Rep. 493.

The reason for the rule announced in this case is well stated in the case of Brown v. Clark, 77 N. Y. 369, where Mr. Justice Andrews, in discussing the identical question here involved, says: "It is quite consistent that the legislature should have intended to leave the former statute in force, although the new statutes took away the reason upon which it was based. The legislature may have deemed it proper to continue it for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage."

SHERIFFS AND CONSTABLES—CONSTITUTIONAL RIGHT OF SHERIFFS TO CUSTODY OF PRISONERS.—A recent statute of New Jersey provided that the charge and keeping of county jails and custody of the prisoners therein should be transferred from the sheriffs to certain board of chosen freeholders. Although the statute providing for the election of sheriff did not specify his duties, it will be observed that such a statute practically releases that officer of his most important duties as generally understood. The Supreme Court of New Jersey had occasion to pass upon this statute in the recent case of Virtue v. Board of Freeholders, 50 Atl. Rep. 360. It was held contrary to the constitution on the ground that the framers of the constitutions of 1776 (article 13) and of 1844, providing that the inhabitants of each county should "annually elect one sheriff," without prescribing in express words the duties which should attach to the office, must be presumed to have known the duties which had theretofore appertained to the office, and to have intended that the designation of the office *eo nomine* should carry such duties with it; and the office of sheriff, with its common-law duties, having been continued by the colonial and state constitutions, and a part of such duties being the custody of the county jail and of the prisioners confined therein, the statute interfered with the constitutional rights of that officer. The court said in part:

"Can the legislature detach from the office of sheriff the custody of the county jail and of the prisoners confined in that institution, and commit such custody to some other officer, to be selected by that body? We think this question must be answered in the negative. As was said by Cole, J., in State v. Burnst, 26 Wis. 412, 7 Am. Rep. 84, if the legislature can do this, no reason can be perceived why it may not also strip the office of every other power, duty, or function which pertains to it, and leave to the electors of the state only the privilege of choosing an officer who would be sheriff in name, but with no power to perform any of the duties or exercise any of the functions belonging to that office. The case cited, as well as Warner v. People, 2 Denio, 272, 43 Am. Dec. 740, People v. Keeler, 29 Hun, 175, and Allor v. Wayne Co., 43 Mich. 76, 4 N. W. Rep. 492, support the conclusion which we have reached upon this point. The only case to which we have been referred, or which we have found, supporting an opposite conclusion, is State v. Dews, R. M. Charlt. 443, which holds that a sheriff is entirely a ministerial officer, whose province is to execute duties prescribed by law, and which duties may be contracted, enlarged, or transferred at the will of the legislature. It is enough to say, with respect to this case, that the reasoning of the opinion does not commend itself to us. We conclude, therefore, that the various statutes which have been referred to, so far as they deprive the sheriffs of the custody as the common jail of their respective counties and of the prisoners confined therein, and place it in the hands of board of freeholders, are inoperative and void."

CONFLICT OF LAW AS TO SALE OF LIVE STOCK IN ONE STATE HELD UNDER CHATTEL MORTGAGE IN ANOTHER.

From an early stage of civilization chattel mortgages have been an important medium of security for the payment of money, and they are at the present day the most available means whereby very large and very valuable classes of personal property may be pledged for a present or future debt or turned to secure one about to be lost. The genius of these instruments, and the rules of law and common sense pertaining to them, are neither occult nor esoteric, not hidden and mysterious, nor unintelligible to any business man who will give them some attention. The whole subject cannot be covered, of course, in the limits of a paper like this. I shall confine this paper, therefore, largely to matters growing out of the live stock industry, though most of what I shall say applies with equal force to other species of personal property.

In some of the leading law schools of the country the method of study now chiefly employed is that of studying directly cases that have been decided by the courts where the facts and the law appear together instead of the text books where the abstract principles of the law are stated with conciseness and precision. The student is given these leading cases and encouraged to study them separately, and to learn for himself what principles are applied in each case with the scope of their application and their limitations, and he thus learns them, not as abstract statements, but as living things applied and interwoven with facts common to his experience and observation. Now, we want to get the law applicable to certain features of chattel mortgages, and I know of no better way than the modern method of case study.

Take the case of Brown against Campbell, decided by the Supreme Court of Kansas in 1890, and reported in 44 Kan. 237. In 1888 C. J. Blanchard resided in Cowley county in this state and owned forty-five head of cattle then at his home. He mortgaged these cattle along with other property to Brown Brothers to secure the payment of a note for $2,050. The mortgage was filed with the register of deeds of Cowley county on the day following its execution, and the mortgagor was permitted to retain the possession of the mortgaged property. About five months afterward, and before any part of the debt had been paid, and without the knowledge or consentof the mortgagees, these cattle were shipped to the Kansas City stock yards, being consigned in the name of the mortgagor's wife to The James H. Campbell Company, a live stock commission firm doing business at the yards, who sold and delivered them on the Kansas side in four different lots to different purchasers in the ordinary course of business and paid the avails to the consignor. Upon learning of the shipment and sale of these cattle the mortgagees entered suit in the district court of Wyandotte county against the commission firm which sold the cattle to recover their value, alleging a conversion. This suit finally reached the Supreme Court of Kansas which held in favor of the claim of the mortgagees for the value of the cattle against the commission firm which sold them. The case was ably tried, and every argument which could be adduced in favor of the defendant was brought to the attention of the court. Mr. Justice Valentine, delivering the opinion of the court, said: "The mortgage was valid; it had been executed and deposited in the office of the register of deeds less than one year prior to the sale; the defendant was bound to take notice of the mortgage and the plaintiff's rights thereunder, and in law the plaintiffs were the owners of the property and had the absolute right to the possession and control thereof; the defendant sold and delivered this property to different persons, not under the mortgage or subject to the mortgage, but independent thereof, and as the absolute property of M. A. Blanchard, and attempted to give to the purchasers the absolute title thereto and the absolute control and dominion over the same. All this was in violation of the plaintiffs' rights, and rendered the defendant liable to the plaintiff as for a conversion of the property." Thus was settled the law in Kansas that a mortgagee under a valid Kansas chattel mortgage may recover in the courts of that state the value of mortgaged property from any one converting the same to his own use or depriving such mortgagee of his rightful possession or control of the same; and this in addition to and beyond his right to follow and recover the mortgaged property itself anywhere within the jurisdiction of the courts of the state. This decision, however, covers only the case of a Kansas chattel mortgage in a Kansas court.

Take the case of a Nebraska chattel mortgage in a Kansas court. The case of Handley against Harris, decided by the Supreme Court of Kansas in May, 1892, and reported in 48 Kan. 606, was an action in replevin to recover personal property claimed under a chattel mortgage duly executed and recorded in the state of Nebraska, and valid by the laws of that state, which property had been subsequently removed to Kansas and sold to a purchaser who had no knowledge of the Nebraska mortgage and who paid full value for the property. The court said: "Where a mortgagor removes property from another state into this state, which has been incumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage,

or necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property. The constructive notice imparted by the recording of such mortgage, by the law of comity between the different states, is not confined to the county or state where the mortgage was executed and the property was, but covers the property wherever it is removed." Herein is given the same force and effect in Kansas to a chattel mortgage executed and recorded in another state that would be given to it in the state where made.

Take the case of a Kansas chattel mortgage in a Missouri court. The National Bank of Commerce of Kansas City against Nelson Morris and others, decided by the Missouri Supreme Court in February, 1893, and reported in 114 Mo. 255. In 1890, B. A. Webber and W. D. Wilson executed and delivered to G. A. Dunn a chattel mortgage on certain cattle then in the state of Kansas to secure the payment of their note for $15,675, payable ten months after date. A copy of the mortgage was deposited in the office of the register of deeds of Edwards county, Kansas, the place of residence of W. D. Wilson, and in the office of the register of deeds of Stafford county, the place of residence of B. A. Webber. The mortgage contained the usual provisions that possession of the cattle was to remain with the mortgagors until default in payment, and in case of a sale or disposal or attempt to sell or dispose of the mortgaged property, or a removal or attempt to remove the same from certain designated counties in Kansas, then the mortgagee might take possession of the property. The National Bank of Commerce acquired this note and mortgage in the usual course of business. Prior to the maturity of the note the mortgagors, without the knowledge or consent of the mortgagee or his transferee, shipped the cattle to the stock yards in East St. Louis, Illinois, where they were sold to defendants through commission men. The bank sued for the value of the cattle in St. Louis, Mo., securing service on the defendants in that jurisdiction. The case finally reached the Supreme Court of the state of Missouri where it was ably and exhaustively argued by learned counsel on both sides. This was a battle of financial giants for a prize worth their efforts. On one side was the largest bank in the southwest, and on the other the millionaire packer and more than $15,000 to the winner. In the case was involved the force and effect to be given to the laws of three states, each differing from the other, and involving points of law never before passed upon by that court, with the weight of recent judicial authority in other jurisdictions in favor of the plaintiff, and a powerful equity in favor of the defendants who had purchased the cattle in another state far removed from where they were mortgaged and paid full value for them without any knowledge of the mortgage, the latter feature of the case having appealed so strongly to Judge Valliant, who tried the case in the lower court, and who is now an associate justice of the Supreme Court of the state of Missouri, as to induce him to rule in favor of the defendants. The supreme court permitted a recovery. Mr. Justice Burgess delivered the opinion of the court, and in the opinion said: "The mortgage was duly executed and recorded in the state of Kansas, and all persons thereafter purchasing the cattle within the borders of that state were bound in law to take notice thereof; and the same rule, by virtue of comity between states, applied to the cattle in the state of Illinois when they were shipped into that state. * * * Having complied with the law of the state in regard to such instruments where the mortgage has been executed and recorded by comity between states, the plaintiff holding under the mortgage has the superior legal right, and when defendants purchased the cattle it was their duty to see that the vendor was the owner and had a right to sell the same. * * * By the terms of the mortgage the mortgagee was secured the right to take possession of the property upon the contingency of its removal or sale before the maturity of the debt. Whenever, then, the property was removed and sold it was a conversion, and a right of action accrued to the mortgagee, and he was not obliged to wait until the note matured before bringing his suit."

The same rule is applied in Illinois. In the case of Mumford against Canty,[1] which was replevin by a mortgagee under a chattel mortgage executed and recorded in the state of Missouri, and

[1] 50 Ill. 370.

valid under the laws of that state, but which would have been invalid under the laws of Illinois, because not executed and recorded in conformity therewith, to recover part of the mortgaged property which had been attached by an Illinois creditor while it was temporarily in the latter state, the court said: "This court has held in several cases that contracts made in other states will be enforced, although not conforming to our laws, if they are in accordance with the laws of the state where they were executed." Quoting with approval cases from Indiana and Ohio and other jurisdictions sustaining the principle that a chattel mortgage valid where made must be held valid everywhere, the court said: "These authorities seem to be in point and announce rules which, if recognized, must govern this case. * * * We are of the opinion that the case must be governed by the rules of comity."

These decision indicate the law in Kansas, in Missouri and in Illinois, in which states are located the great markets to which live stock is shipped for sale, and they are in accord with the weight of authority throughout the United States, to the effect that a chattel mortgage valid in the state where executed and filed or recorded must be held to be valid and to follow and cover the mortgaged property anywhere the same may be removed, and any one converting the mortgaged property to his own use, or depriving the mortgagee or his assignee of his rightful control or dominion over the same, is liable for the value of the property as for a conversion. This rule is denied in a few states, notably in Michigan, Nebraska and Kentucky, and it has been denied and a different rule declared by the Court of Appeals for the Indian Territory, but the United States Circuit Court of Appeals, speaking through Judge Caldwell, has recently reversed that decision and set the law in the Indian Territory in accord with the theory above declared. The Kansas City Court of Appeals has recently handed down a decision in which the broad rule above declared and applied as to responsibility for conversion of mortgaged property is modified to the extent of holding that a commission merchant, acting for a disclosed principal who sells and delivers mortgaged property without any knowledge of the mortgage, is not responsible to the mortgagee for the value of the property as for a conversion, applying the well known principle of agency that a duly authorized agent acting in behalf of his principal is not personally responsible on the contract when the third party knows that he acts in the name and in behalf of the principal. This rule has been applied in the case of auctioneers selling in the regular course of their business in California, Minnesota, Tennessee, and some other states, but it remains to be seen whether it will be upheld by the Supreme Court of Missouri and other courts of last resort in the great stock-growing region of the southwest. It seems, however, to rest on sound reasoning and well settled principles of law and is likely to stand. It is a fact worthy of mention that in all the decisions to which attention has been called, with the single exception of Handley against Harris from Kansas, the decisions of the lower courts were reversed on the law involved and at the same term in which the Kansas case was heard that court reversed a decision from another county involving the same question. It is evident, therefore, that this theory of the law has not been established without conflict.

J. W. MARLEY.

INJUNCTION — CONTRACT FOR PERSONAL SERVICES — MUTUALITY.

PHILADELPHIA BALL CLUB, Limited, v. LAJOIE.

Supreme Court of Pennsylvania, April 21, 1902.

1. To authorize injunction restraining an employee from rendering services for another, contrary to his contract of employment, it is not necessary that his services be of such a character as to render it impossible to replace him; it is enough that his services are of such a unique character, and display such a special knowledge, skill, and ability, as render them of peculiar value to the employer, and difficult of substitution.

2. There is irreparable damage authorizing injunction where no certain pecuniary standard exists for measurement of the damage.

3. A contract of employment of a ball player for a season, giving the employer a right of renewal of the contract for three succeeding seasons, by notice given before close of each current season, and providing for termination of the contract on ten days' notice, and providing that the employee may be enjoined from playing for another during the continuance of the contract, these provisions being declared part of the consideration for the agreement to pay the stipulated salary, is not lacking in mutuality of remedy, or so unreasonable as to prevent issuance of injunction; the contract having been part performed, and the employer being desirous of its continuance.

POTTER, J.: The defendant in this case contracted to serve the plaintiff as a base ball player for a stipulated time. During that period he was not to play for any other club. He violated his agreement, however, during the term of his engagement, and, in disregard of his contract, arranged to play for another and a rival organization. The plaintiff, by means of this bill, sought to restrain him during the period covered by the contract. The court below refused an injunction, holding that to warrant the interference prayed for "the defendant's services must be unique, extraordinary, and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the court, the defendant's qualifications did not measure up to this high standard. The trial court was also of opinion that the contract was lacking in mutuality, for the reason that it gave plaintiff an option to discharge defendant on ten days' notice, without a reciprocal right on the part of the defendant.

The learned judge who filed the opinion in the court below, with great industry and painstaking care, collected and reviewed the English and American decisions bearing upon the question involved, and makes apparent the wide divergence of opinion which has prevailed. We think, however, that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace him he has taken extreme ground. It seems to us that a more just and equitable rule is laid down in Pom. Spec. Perf. p. 31, where the principle is thus declared: "Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill, and ability in the employee, so that in case of a default the same service could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. * * * The damages for breach of such contract cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same service in the labor market." We have not found any case going to the length of acquiring, as a condition of relief, proof of the impossibility of obtaining equivalent service. It is true that the injury must be irreparable; but, as observed by Mr. Justice Lowrie in Com. v. Pittsburgh & C. R. Co., 24 Pa. 160, 62 Am. Dec. 372: "The argument that there is no 'irreparable damage' would not be so often used by wrongdoers if they would take the trouble to discover that the word 'irreparable' is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimated only by conjecture, and not by any accurate standard." We are therefore within the term whenever it is shown that no certain pecuniary standard exists for the measurement of the damages. This principle is applied in Vail v. Osburn, 174 Pa. 580, 34 Atl. Rep. 315. That case is authority for the proposition that a court of equity will act where nothing can answer the justice of the case but the performance of the contract in specie, and this even where the subject of the contract is what, under ordinary circumstances, would be only an article of merchandise. In such a case, when, owing to special features, the contract involves peculiar convenience or advantage, or where the loss would be a matter of uncertainty, then the breach may be deemed to cause irreparable injury.

The court below finds from the testimony that "the defendant is an expert base ball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the team would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game." We think that, in thus stating it, he puts it very mildly, and that the evidence would warrant a stronger finding as to the ability of the defendant as an expert ball player. He has been for several years in the service of the plaintiff club, and has been re-engaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of the other players in the club, and his own work is peculiarly meritorious as an integral part of the team work which is so essential. In addition to these features which render his services of peculiar and special value to the plaintiff, and not easily replaced, Lajoie is well known, and has great reputation among the patrons of the sport, for ability in the position which he filled, and was thus a most attractive drawing card for the public. He may not be the sun in the base ball firmament, but he is certainly a bright particular star. We feel, therefore, that the evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill, and ability, as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce "irreparable injury," in the legal significance of that term, to the plaintiff. The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate redress at law, and the case, therefore, properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoining against its breach.

But the court below was also of the opinion that the contract was lacking in mutuality of remedy, and considered that as a controlling reason for the refusal of an injunction. The opinion quotes the nineteenth paragraph of the contract, which gives to the plaintiff a right of renewal for the period of six months, beginning

April 15, 1901, and for a similar period in two successive years thereafter. The seventeenth paragraph also provides for the the termination of the contract upon ten days' notice by the plaintiff. But the eighteenth paragraph is also of importance, and should not be overlooked. It provides as follows: "(18) In consideration of the faithful performance of the conditions, covenants, undertakings, and promises herein by the said party of the second part, inclusive of the concession of the options of release and renewal prescribed in the seventeenth and nineteenth paragraphs, the said party of the first part, for itself and its assigns, hereby agrees to pay to him for his services for said term the sum of twenty-four hundred dollars, payable as follows," etc. And, turning to the fifth paragraph, we find that it provides expressly for proceedings, either in law or equity, "to enforce the specific performance by the said party of the second part, or to enjoin said party of the second part from performing services for any other person or organization during the period of service herein contracted for; and nothing herein contained shall be construed to prevent such remedy in the courts, in case of any breach of this agreement by said party of the second part, as said party of the first part, or its assigns, may elect to invoke."

We have, then, at the outset, the fact that the paragraphs now criticised and relied upon in defense were deliberately accepted by the defendant, and that such acceptance was made part of the inducement for the plaintiff to enter into the contract. We have the further fact that the contract has been partially executed by services rendered, and payment made therefor, so that the situation is not now the same as when the contract was wholly executory. The relation between the parties has been so far changed as to give to the plaintiff an equity, arising out of the part performance, to insist upon the completion of the agreement according to its terms by the defendant. This equity may be distinguished from the original right under the contract itself, and it might well be questioned whether the court would not be justified in giving effect to it by injunction, without regard to the mutuality or non-mutuality in the original contract. The plaintiff has so far performed its part of the contract in entire good faith, in every detail, and it would therefore be inequitable to permit the defendant to withdraw from the agreement at this late day.

The term "mutuality" or "lack of mutuality" does not always convey a clear and definite meaning. As was said in Grove v. Hodges, 55 Pa. 516: "The legal principle that contracts must be mutual does not mean that in every case each party must have the same remedy for a breach by the other." In the contract now before us the defendant agreed to furnish his skilled professional services to the plaintiff for a period which might be extended over three years by proper notice given before the close of each current year. Upon the other hand, the plaintiff retained the right to terminate the contract upon ten days' notice and the payment of salary for that time and the expenses of defendant in getting to his home. But the fact of this concession to the plaintiff is distinctly pointed out as part of the consideration for the large salary paid to the defendant, and is emphasized as such; and owing to the peculiar nature of the services demanded by the business, and the high degree of efficiency which must be maintained, the stipulation is not unreasonable. Particularly is this true when it is remembered that the plaintiff has played for years under substantially the same regulations.

We are not persuaded that the terms of this contract manifest any lack of mutuality in remedy. Each party has the possibility of enforcing all the rights stipulated for in the agreement. It is true that the terms make it possible for the plaintiff to put an end to the contract in a space of time much less than the period during which the defendant has agreed to supply his personal services; but mere difference in the rights stipulated for does not destroy mutuality of remedy. Freedom of contract covers a wide range of obligation and duty as between the parties, and it may not be impaired, so long as the bounds of reasonableness and fairness are not transgressed. If the doctrine laid down in Rust v. Conrad, 47 Mich. 449, 11 N. W. Rep. 265, 41 Am. Rep. 720, quoted in the opinion, is to prevail, it would seem that the power of the plaintiff to terminate the contract upon short notice destroys the mutuality of the remedy. But we are not satisfied with the reasoning intended to support that conclusion. We cannot agree that mutuality of remedy requires that each party should have precisely the same remedy, either in form, effect, or extent. In a fair and reasonable contract, it ought to be sufficient that each party has the possibility of compelling the performance of the promises which were mutually agreed upon. It is true, also, that the case of Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955, also quoted in the opinion, while not turning exclusively upon that point, seems to hold that a contract in which the plaintiff has an option to terminate it in a year cannot be enforced in equity on account of lack of mutuality; but in Singer Sewing Mach. Co. v. Union Button Hole & Embroidery Co., Holmes, 253, Fed. Cas. No. 12,904, Judge Lowell says, with reference to that case: "I cannot think that the court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Everything must depend upon the nature and circumstances of the business." This judgment seems to be borne out; for in a later case, that of Telegraph Co. v. Harrison, 145 U. 459, 12 Sup. Ct. Rep. 900, 36 L. Ed. 776, where the plaintiff had a right to terminate the contract for telegraphic service at the end of any year, while the defendant's obligation continued as long as the plaintiff chose to pay the yearly

price for the service, the doctrine that such conditions constituted lack of mutuality does not seem to have been recognized. In Singer Sewing Mach. Co. v. Union Button Hole & Embroidery Co., *supra*, which was a case where an injunction was allowed against the defendant, although the plaintiff had the right to terminate the contract, Judge Lowell, in the course of a strongly reasoned opinion, says (page 259): "In many of the cases that I have cited, the plaintiff had it in his power to end the contract. It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable." On page 258 he says: "I think the fair result of the later cases may be thus expressed. If the case is one in which a negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason or policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

The case now before us comes easily within the rule as above stated. The defendant sold to the plaintiff, for a valuable consideration, the exclusive right to his professional services for a stipulated period, unless sooner surrendered by the plaintiff, which could only be after due and reasonable notice and payment of salary and expenses until the expiration. Why should not a court of equity protect such an agreement until it is terminated? The court cannot compel the defendant to play for the plaintiff, but it can restrain him from playing for another club in violation of his agreement. No reason is given why this should not be done, except that presented by the argument, that the right given to the plaintiff to terminate the contract upon ten days' notice destroys the mutuality of the remedy. But to this it may be answered that, as already stated, the defendant has the possibility of enforcing all the rights for which he stipulated in the agreement, which is all that he can reasonably ask. Furthermore, owing to the peculiar nature and circumstances of the business, the reservation upon the part of the plaintiff to terminate upon short notice does not make the whole contract inequitable.

In this connection another observation may be made, which is that the plaintiff, by the act of bringing this suit, has disavowed any intention of exercising the right to terminate the contract on its own part. This is a necessary inference from its action in asking the court to exercise its equity power to enforce the agreement made by the defendant not to give his services to any other club. Besides, the remedy by injunction is elastic and adaptable, and is wholly within the control of the court. If granted now, it can be easily dissolved whenever a change in the circumstances or in the attitude of the plaintiff should seem to require it. The granting or refusal of an injunction or its continuance is never a matter of strict right, but is always a question of discretion, to be determined by the court in view of the particular circumstances.

Upon a careful consideration of the whole case, we are of opinion that the provisions of the contract are reasonable, and that the consideration is fully adequate. The evidence shows no indications of any attempt at overreaching or unfairness. Substantial justice between the parties requires that the court should restrain the defendant from playing for any other club during the term of his contract with the plaintiff.

The bill as filed contemplated only the services of defendant for the season of 1901, but it is stated in the argument of counsel that since the hearing in the court below, and prior to the argument in this court, the plaintiff, by due notice, renewed the current contract for the season of 1902.

The specifications of error are sustained, and the decree of the court below is reversed, and the bill is reinstated; and it is ordered that the record be remitted to the court below for further proceedings in accordance with this opinion.

Before annotating the above case we desire to present to the profession the valuable and learned opinion of Taity, J., in the case of American Base Ball & Athletic Exhibition Co. v. Harper, decided a few weeks ago in the Circuit Court of the City of St. Louis, involving the identical questions and the construction of the identical contract constituting the subject-matter of the Pennsylvania case.

AMERICAN BASE BALL & ATHLETIC EXHIBITION CO. v. HARPER.

Circuit Court of St. Louis, May, 1902.

1. The doctrine that equity will restrain by injunction the breach of a contract for personal services where they are of an unique and extraordinary character held on the facts not to apply to the case of one agreeing to render service for a term as a professional base ball player.

2. An agreement for personal services under which the servant agrees to remain in the employment for a year, but with no agreement on the other side that he will be employed for the term, but on the contrary the master is given power to terminate the hiring by notice or for causes of which he is made the sole judge lacks mutuality, and equity will not restrain the servant by injunction from entering the service of a third person before the end of the term.

3. The plaintiff was a member of an association of base ball clubs whose objects were in part to control the salaries of players, the price of admission to the game to be played by the different clubs, and the method and terms of employment of players. Held that it had no standing in a court of equity to restrain the breach of a contract made with it by one of its players.

4. Under the provisions of the Missouri constitution declaring that all persons have the natural right to life, liberty, and the enjoyment of the gains of their own industry, and prohibiting slavery or involuntary

servitude, except as a punishment for crime, a court has no power to enforce the performance of personal services due by one person to another under a contract.

TALTY, J.: Plaintiff's bill praying for injunctive relief charges that the defendant contracted to render its services as a base ball player for the season of 1901, to-wit: From April 15 to October 15, 1902, and that he would not play for any other club during that period, but that he refuses to abide by, or perform the terms of his agreement, and has entered into a contract to play with the American League club of St. Louis. And this was proven at the hearing.

The bill further alleges that the personal qualifications and services on the part of defendant, which he contracted to render plaintiff, were of the class and type known and recognized as special, unique, extraordinary and artistic, and resulted in the peculiar qualifications in this respect possessed by defendant as an individual base ball player. But the evidence did not establish these allegations to our satisfaction. Plaintiff's bookkeeper, B. J. Muckenfuss, who is not a ball player, undertook to testify as an expert and said that defendant had a good reputation, was a drawing card and up to a certain time last season his percentage as a pitcher was high, but he added that he was young and had a promising future. The official record of the average of base ball players and the testimony of witnesses Tebeau and Joyce, both veterans in the base ball arena, did not tend to show that Harper's services are of a unique character, or that he has special or peculiar knowledge, skill or ability, the former stating that in 1899 he was quite a young pitcher, so that they loaned him out, and that they did not see him again until he came here last season, when he saw him pitch three or four games which he thought were good, first-class, and the latter testified that he could not form any opinion as to what sort of a player he was.

When services contracted for the purely intellectual and personal in their character, such as the services of authors or actors, for instance, courts of equity have interfered to restrain the breach of a contract for such services, upon the ground that they are unique, individual and peculiar.

But we are referred to a recent decision in a case similar to this against one Lajoie in Pennsylvania, where the writ of injunction issued. Decisions of the courts of other states are persuasive, but we are not bound to follow them. And, furthermore, it is sufficient to say that it is apparent from a reading of that decision, that plaintiff's evidence there was quite different, much stronger, than that adduced at the hearing of this case.

Again, it is contended, and we are of the opinion, that the contract is lacking in mutuality. Defendant is bound as with bands of steel for the entire contractual period, while section 4 gives the plaintiff the power at its option to expel defendant, which means to cancel the contract, for certain enumerated acts or reasons, of all of which the plaintiff is made the exclusive and abritrary judge, and section 14 gives it the right to end and determine all its liabilities and obligations thereunder by simply giving the defendant ten days' notice of its intention to do so. Numerous cases expressly holds that courts of equity will never interfere to enforce a contract where the power to revoke or terminate the same is given to either party to the agreement, the reason being that such contract might be terminated by the party holding the option after decree of performance in his favor was rendered, and the decree thus made nugatory. Express Co. v. Ry. Co., 99 U. S. 191; Rutledge Marble Co. v. Ripley, 10 Wall. 339; Rust v. Conrad, 47 Mich. 449.

And it will not do to say that the plaintiff in bringing this action has disavowed any intention of exercising the right to terminate the contract on its part. It is not, to our mind, a necessary inference. Its motive might be to weaken the club by which defendant is now employed, which it terms in its bill a rival. Nor will it do to say that the fact that the remedy by injunction is elastic and adaptable and wholly within the control of the court, and that it can be easily dissolved whenever there is a change in the circumstances or a termination of the contract by plaintiff by giving the ten days' notice, alters the case or justifies granting the order, for once restrained there is nothing to prevent the injury to defendant made possible by the lack of mutuality in the contract; that is, plaintiff could terminate it at will, and it would be useless then to dissolve the injunction, for it would not place defendant back in the position from which it removed him, and he would be left without employment.

Nor can we agree with the reasoning in the Lajoie case, as we understand it, that, even though under the law the courts cannot enforce the contract, still the want of power in the courts is supplied by the fifth paragraph of the contract, which, using the language of that decision, reads: "And turning to the fifth paragraph, we find that it provides expressly for proceedings, either in law or equity, to enforce the specific performance by the said party of the second part, or to enjoin said party of the second part, from performing services for any other person or organization during the period of services herein contracted for. And nothing herein contained shall be construed to prevent such remedy in the courts in case of any breach of this agreement by said party of the second part, as said party of the first part, or its assignee, may elect to invoke. We have, then, at the outset, the fact that the paragraphs now criticised and relied upon in defense were deliberately accepted by the defendant," etc. The speciousness of this argument is shewn by the words of Sherwood, J., in Jones v. Williams, 130 Mo. *l. c.* 100, where he says: "In this case, while the general concession is fully made that a court of equity cannot enforce a contract for personal services; yet it is also said: 'But this want of power in the courts is supplied in the contract itself. This remark prompts this question: If the courts cannot enforce a contract for personal services, how can the contract enforce itself? And if it cannot enforce itself and cannot be enforced by the courts, what account is it?'"

We will pass from defendant's contention that the provisions of the contract are, as a whole—which includes the league constitution, rules and regulations, which, by paragraph 14, are made a part of the agreement—lacking in uniformity, and are so unfair and unconscionable as to make it inequitable for a court of equity to enforce the same, so the point made that the contract is against public policy. Now, even if it does not come within the prohibition of the anti trust statute, the evidence shows that plaintiff was, during the life of the contract in suit, in league or combination with other clubs to fix and control the salary of players, the price of admission to be charged at the games played by members of the combination, and to control the employment of players. The contract

was made in furtherance of this combination, and if, as urged by defendants, it was an unlawful one, it is against public policy, and bars plaintiff from obtaintaining the relief sought in a court of equity. State v. Insurance Co., 152 Mo. *l. c.* 43; National Lead Co. v. Grote, 80 Mo. App. *l. c.* 270; Froelich v. Musicians, No. 8,269, St. Louis Court of Appeals; Addyson v. United States, 175 U. S. 244; Butchers' United States H. & L. S. L. Company v. Crescent City Company, 111 U. S. 746.

It is also strenuously contended that the courts, sitting as a court of equity, has no power to restrain the defendant from rendering personal services to his present employer, that the exercise of such jurisdiction by the court would be in contravention of certain provisions of the state and federal constitution.

Sec. 4, art. II., of the Missouri constitution declares that "all persons have the natural right of life, liberty, and the enjoyment of the gain of their own industry, and that to give security to these rights is the principal office of government."

Sec. 30 of the same article provides that no person shall be "deprived of life, liberty or property without due process of law."

And sec. 31 of the same article declares that there "cannot be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted." Practically the same provisions are contained in the United States constitution, art. V.; section 1 of art. VIII.; and sec. 1 of art. XIV., of the amendment to the instrument.

Of course it is urged that numerous courts having granted injunctive relief in similar cases, that therefore there is nothing in this point that the question has been adjudicated, but defendant's counsel answer that it does not appear that this question of personal liberty was ever raised in those cases.

Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists in the right to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restricting it as the rights of others make it necessary for the welfare of other citizens. St. Louis v. Fitz, 53 Mo. 582; State v. Julow, 129 Mo. 163; City v. Roach, 128 Mo. 128; Allgeyer v. Louisiana, 165 U. S. 578. "The security of individual rights cannot be too frequently declared, nor in too many form of words; nor is it possible to guard too frequently against the encroachments of power. These terms, 'life,' 'liberty,' and 'property' are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right to self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may; all our liberties, personal, civil and political; in short, all that makes life worth living; and of none of these liberties can any one be deprived, except by due process of law. No halfway house stands on the highway between absolute prevention and absolute freedom. The rights established by section 14 (federal constitution) can neither be impaired by the legislature, nor hampered nor denied by the courts." Clothing Co. v. Watson, 67 S. W. Rep. 391, and cases cited.

It is the wish and pleasure of the defendant to serve his present employer. In doing this he exercises the right of choosing his own associates and serving whom he sees fit, going at his own pleasure, following his chosen occupation and enjoying the gains of his own industry. These are the natural rights of free men, and go to make up the "liberty" which the constitutional provisions in question guarantee and protect. And it would seem that they are rights which cannot be bartered away by either contract or consent, because all provisions of agreements in contravention of law are void. One may, by contracting to render personal services to another, lay himself liable in money damages to his contractee in case he does not carry out his agreement; but can he be deprived of the rights or liberties given by the state and federal constitution? Can any such penalty be imposed for the breaches of a contract? And if not, would it be depriving him of the rights vouchsafed him by the constitution to restrain him from serving his present employer? The injunction is denied.

NOTE.—The facts in each of the cases above are the same, and the question may be briefly stated thus: A agrees to play base ball for B for a stipulated term. The agreement gives B the right of renewal for two successive terms on giving notice to A. B has also the right to terminate the agreement at any time upon ten days' notice. During the period of his hiring as above stipulated, A expressly agrees not to play for any other club. A during the term leaves the service of B and enters into an agreement to play for another club. B brings suit in equity to restrain A from playing with the new club. The Pennsylvania court grants the injunction, the St. Louis court refuses it.

In the Pennsylvania case two questions only were passed upon by the court: 1. The power of a court to enforce by injunction a contract for personal service. 2. The mutuality of the agreement. Both of these questions were likewise decided in the St. Louis case, as well as two others which were evidently not argued in the Pennsylvania case.

1. *The Power of Equity to Enforce Contracts for Personal Services.*—The general rule is, that a contract for services cannot be specifically enforced. Stocker v. Brockelbank, 3 MacN. & G. 250; nor can this be done indirectly by an injunction restraining the employee from leaving the service. Arthur v. Oakes, 63 Fed. Rep. 310, reversing, *pro tanto*, Farmers' Loan & Trust Co. v. N. Pac. Ry. Co., 60 Fed. Rep. 803; Toledo R. Co. v. Penn. Co., 54 Fed. Rep. 746. But if the contract of service contains a negative stipulation not to perform services for another during the period of employment, that stipulation may be enforced by injunction in the case of services of an unique and extraordinary character which cannot be obtained elsewhere. Lumley v. Wagner, 1 DeG., M. & G. 604, affirming 5 DeG. & Sm. 485; Grimston v. Cunningham (1894), 1 Q. B. 125; Duff v. Russell, 133 N. Y. 678, 31 N. E. Rep. 622, affirming 16 N. Y. Supp. 958, and 14 N. Y. Supp. 134; Hoyt v. Fuller, 19 N. Y. Supp. 962; Whitford Chemical Co. v. Hardman, 2 Ch. 416 (1891), disapproving Montague v. Flockton, 16 L. R. Eq. 189. The rule to be deduced from all these cases is that the injunction will only be granted when the employee is one who has a special qualification for the service, and cannot be readily replaced, so that his performing similar services for another would occasion great and irreparable damage to the employer.

In some of the American cases just cited the agreement to serve the plaintiff during a certain term is treated as an agreement likewise to serve no one else during that term; while in the latest English cases an express negative covenant is required or the in-

junction will not be granted. This question is, however, immaterial here, as the contracts in both the Pennsylvania and the St. Louis cases contained express negative covenants.

The sole question on this branch of the case was, Did the defendant have such special qualifications as to fall under the exception to the general doctrine that agreements for personal service will not be enforced in equity? This exception is generally stated thus: Where the service contracted for is of an unique, special or extraordinary kind, and the servant on account of such special qualifications cannot be readily replaced, an injunction will be granted. Pom. Eq. Jur. § 1343. It is to be observed that all the reported cases up to this time involved the exercise of mental and intellectual powers,—authors, singers, actors, and the like. Lumley v. Wagner, *supra;* Daly v. Smith, 49 How. Pr. 150; Hahn v. Concordia Soc., 42 Md. 465; McCaull v. Braham, 16 Fed. Rep. 37; Fredricks v. Mayer, 13 How. Pr. 567; Butler v. Galleti, 21 How. Pr. 466. At the same time no sound reason can be given for this limitation, for if the servant does possess an unique and special qualification for the work he agrees to perform, even though the nature of that work be mechanical or physical, and only in a small degree mental or intellectual, there will be the same difficulty in obtaining from others the same service, and the same ground exists for the application of the preventive remedy of injunction. Nevertheless in no reported case where the injunction has been granted was the defendant other than an author, a singer or an actor. In Cort v. Lassard, 18 Oreg. 221, the defendants were acrobats and tumblers, and their performance the court found "was not of an unique or unusual character, but that of an ordinary acrobat and tumbler which could have been easily supplied with little or no delay or expense." The injunction was refused. In Strobridge Lith. Co. v. Crane, 12 N. Y. S. 878, the defendant was a lithographic designer or sketch artist, and the court found that "there was nothing uncommon in his qualifications. He is simply a talented and rising young member of the guild of lithographic sketchers." The injunction was refused.

There is no conflict of opinion in the courts of Pennsylvania and St. Louis as to the law. Both assume that there is a limited class of cases where equity will enjoin the employee from serving any one else but the plaintiff. The conflict is on the question of fact, the Pennsylvania court holding that Lajoie had special and extraordinary qualifications in the work which he agreed to do; the St. Louis court holding on the other hand that Harper had not. The result is rather peculiar, and it is not easy to say which of the two after all gets the best of the litigation. The one has a solemn judicial finding that he is a person of such attainments in his profession that his place cannot possibly be filled; the other is decreed to be simply an ordinary person whose absence from his post can result in no particular damage. Lajoie's reputation is enhanced at the cost of his freedom, Harper gets his freedom at the expense of his professional reputation.

But while both courts, as we have said, assume the existence of exceptional cases of personal service where equity will act, it is not clear that this supposed exception is very strongly imbedded in either English or American law. An examination of the English cases since Lumley v. Wagner will show that the courts of that country are not at all disposed to extend the doctrine of that case. Since they have been confronted with the other side of the dispute, *i. e.*, where it is the servant who asks for the writ (Whitford Chemical Co. v. Hardman, *supra*), the inconvenience of the remedy and the difficulty of administering it have become very real. No court has yet gone so far as to say that if a master or employer who has engaged one to work for him for a term, discharges him before the end of the term, without good cause, it will enjoin him from employing any one else in his place until the end of the term. And if the remedy is not as open to the servant as to the master, can a court of equity without rejecting one of its foundation maxims grant to the one what it would have to refuse to the other. There is really no reason or justice in this apparent exception, and the law ought to be, and in time will be, as stated by Mr. Justice Harlan in Arthur v. Oakes, 63 Fed. Rep. 310: "The rule is without exception that equity will not compel the actual affirmative performance by an employee of merely personal services any more than it will compel an employer to retain in his personal service one, who no matter for what cause, is not acceptable to him for services of that character. The right of an employee engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not indirectly or negatively by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of mere personal services."

2. *Mutuality in Contract Law.*—A promise is a good consideration for a promise only where it imposes some legal liability on the person making it. If A binds himself to do something for B and B simply accepts A's offer without binding himself in turn, A's promise cannot be enforced as it lacks a consideration. A very frequent example of this is where a person offers to supply another with such quantities of goods as he may desire at a certain price, and the offeree accepts the offer. This is not an enforceable agreement because the offeree not having bound himself to take any, there is no consideration to support the offerer's promise. Thayer v. Burchard, 99 Mass. 508; Wells v. R. Co., 30 Wis. 605; Barrow S. S. Co. v. R. Co., 134 N. Y. 24; Rafolovitz v. Tobacco Co., 25 N. Y. S. 1036; Stensgard v. Smith, 43 Minn. 11, 44 N. W. Rep. 669; American Cotton Oil Co. v. Kirk, 68 Fed. Rep. 792; Columbia Wire Co. v. Freeman Wire Co., 71 Fed. Rep. 304; Railroad Co. v. Mitchell, 38 Tex. 85; Stiles v. McClellan, 6 Colo. 89; Baltimore, etc. R. Co. v. Potomac R. Co., 51 Md. 32; Hickey v. O'Brien (Mich.), 21 N. W. Rep. 241; Tiepel v. Meyer (Wis.), 81 N. W. Rep. 982; Minn. Lumber Co. v. White Heart Coal Co., 160 Ill. 65; Hoffman v. Maffoli (Wis.), 80 N. W. Rep. 1072; Great Northern R. Co. v. Withan, L. R. 9 C. P. 16.

A number of reported cases illustrate other phases of this principle. In one plaintiff alleged that he had purchased certain real property for a considerable sum of money; that such real estate was situated upon or adjacent to a coach-line conducted by the defendants, being conveniently located for an eating station; that the purchase was induced through a positive promise of the defendant that the said real estate should be used for an eating station for all passengers carried by the defendants; and that plaintiff

was induced by these promises to make a large outlay of money in improving the real estate as well as to make the purchase. The action was for damages sustained from the withdrawal of the patronage of the passengers, and the consequent loss of large profits, as well as a considerable diminution in the value of the property. It was held that there was no mutuality of agreement and the action would not lie (Stiles v. McClellan, 6 Colo. 89), the court saying: "The rule of law cited and relied upon, that a promise is a good consideration for a promise, does not apply to the facts stated. Besides, there is an important qualification to that rule, which is, that there must be an absolute mutuality of engagement, so that each party may have an action on it, or neither will be bound." In another the purchaser of a plantation "bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle and stock, as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means, or with one-half of the profits of the plantation." Held not enforceable, the court saying: "It is signed by both parties in presence of attesting witnesses; and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract in which it is entirely deficient. It wants mutuality. It imposes no obligation on D whatever. He is not bound either to render services or pay money as a consideration for one half the land. P could not support a suit upon it to compel D to do anything." Dorsey v. Packmore, 12 How. 126. So where persons became subscribers to the stock of a corporation upon a promise by the president to take their stock off of their hands when they should require it. It was held that there was no one mentioned, and that the subscribers could not, after retaining the stock until the concern proved disastrous call upon the president to fulfill his promise. Slee v. Bloom, 19 Johns. 456, 10 Am. Dec. 273. A written agreement to give A the refusal of the lease of a farm at a stipulated rent, with no agreement on the part of A to take it, and no other consideration is void. Burnet v. Bisco, 4 Johns. 235. A railroad company employed an engineer upon these conditions: (1) To pay him according to specified rates; (2) not to discharge him without just cause; (3) promote him according to specified grades of service; and (4) that, when discharges of engineers were made, to discharge them in the order of juniority of service. By the contract the engineer did not bind himself to remain in the service of the company for any definite or special time. Held that the company could discharge him at any time, because of the want of mutuality. Railway Co. v. Matthews, 64 Ark. 398, 42 S. W. Rep. 902, 39 L. R. A. 467. By a written contract a water company was to furnish from its canal any surplus water not required for other purposes, without being required to keep its canal in repair, or to perform any labor, or to incur any expense to carry out the contract. The consumer, if the water was furnished, was to pay for it at a stipulated rate, held wanting in mutuality, and not to support an action to recover of the consumer on his failure to take water. Jordan v. Water Co. (Tex.), 61 N. E. Rep. 13. A carrier states his rates to certain points in answer to an inquiry from A. A replies that he accepts the rate. Held no agreement to carry at the rates specified. Chicago, etc. R. Co. v. Jones, 53 Ill. App. 431. A agrees to accept an appointment as agent in a certain field or territory, for the sale of certain machines; to sell these machines at a sufficient price to derive his compensation therefrom; to order all machines from the other, B, needed for the trade in such territory; to handle the goods of B's make exclusively, to pay freights, keep goods housed, pay taxes and assessments, to carry an insurance, to push the sale of goods by canvassing and advertising, to do certain expert work; to sell machines subject to certain printed conditions, to make settlements in certain prescribed forms only, to do many other things specifically set forth in the agreement. B agrees to do two things as follows: "B hereby appoints A as his agent for the sale of," etc., "in the following named territory." and also "in consideration of the foregoing and the faithful performance of this contract by," etc., B "agrees to fill the orders of A for machines, without any liability for damages for failure from any cause to furnish such machines." B discovers that A has been violating his promises and brings an action to recover damages resulting therefrom. Held that the agreement is without mutuality and unenforceable. Harvesting Co. v. Mitchell Co., 89 Fed. Rep. 173. B made A a proposal in writing to allow A to print books from its stereotype plates, on payment of a royalty. A accepted the proposition. Held a mere option without mutuality. Collier v. Trow's Printing & Book Binding Co., 49 Hun, 147, 1 N. Y. Supp. 844. An agreement intended as a substitute for an existing agreement between the same parties was drawn up and sent to the defendant, who approved of it, and promised to execute it, but it was not executed by the plaintiff. Held inoperative for want of mutuality. Wood v. Edwards, 19 Johns. 205. A merchant proposed to engage a shipmaster to transport three cargoes, but the latter refused to contract for more than one, telling the former that when he had carried the first he would tell him whether he would carry the others. Held, that this right to rescind was mutual, and that the one could not be bound to furnish more than the other was bound to convey. Bradley v. Denton, 3 Wis. 557. In a recent Illinois case the consideration for an engagement on the part of the other party was that one would employ him as long as his work was "satisfactory." Said the court: "What obligation does this impose? • • • Suppose they refuse to employ the party of the second part, can an action for damages be maintained for a breach of the contract? The answer of these enigmas is obvious. We think it is plain that the parties of the first part were not bound under the terms of the contract to employ the party of the second part for a single day or hour, and if they had absolutely refused to employ him, he was without remedy in any court of the country. • • • Here the contract implies no obligation on one of the parties and hence it is void for want of mutuality; the contract being void." Vogel v. Pehoe (Ill.), 42 N. E. Rep. 65.

There is direct authority, in the decisions of courts of the high standing of the Supreme Federal Court and the Supreme Court of Michigan that the right of one of the parties to terminate an agreement on notice while the other continues bound and has no such option of revocation, is so wanting in mutuality as to be unenforcable in equity. Marble Co. v. Ripley, 10 Wall. 239; Rusk v. Connard, 47 Mich. 449. And in the our opinion, the base ball contract in issue in the principal case is fatally lacking in the element of mutuality. It is doubtful if it should be sustained even in a court of law. But in a court of equity the case seems absolutely clear. What could the defendant in this case have enforced if the plaintiffs had refused his services

or had discharged him without notice; clearly nothing, for before the case could have been heard the plaintiffs could have put an end to the agreement by the exercise of their option.

3. *The Base Ball Trust.*—This and the next question were apparently not argued in the Pennsylvania case. The decision of the St. Louis court is supported, however, by a recent case in the federal court where the plaintiff asked for an injunction to enjoin ticket brokers from dealing in special tickets which were untransferable. It appeared that the plaintiff was a member of a combination formed by a number of railroads for the purpose of preventing competition, the passenger receipts of all such railroads being pooled and divided on an agreed basis. On this ground the injunction was denied. Delaware, etc. R. Co. v. Frank, 110 Fed. Rep. 689.

4. *The Question of Involuntary Servitude.*—An agreement which would deprive a person completely of his liberty would be void as against public policy, as for example, an indefinite contract of service. (*In re* Baker, 29 How. Pr. 485; Parsons v. Trask, 7 Gray, 473; Dittrich v. Sibey, 51 Pac. Rep. 762); and such agreements are not allowed by the civil law. Pollock on Contracts, 317. At the same time one may legally bind himself to serve another for a term of years (Walter v. Chambers, 5 How. [Del.] 311; Hoyt v. Fuller, 19 N. Y. S. 962; Phillips v. Murphy, 6 Jones [L.] 45); and so one may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights. White v. Newell, 4 Me. 102; Com. v. Schultz, Bright. N. P. 29.

But the question in the principal case is not as to the legality of the agreement to serve another for a term of years at the latter's option; we see nothing in this base ball contract, so far this phase of the case is concerned, to make it unenforceable in a court of law. The question is really this: Has not one who has made a contract by which his services are promised to another for a certain term and who before the end of that term discovers that he has made a bad bargain or circumstances have so changed that his work has become obnoxious or he finds that he can earn a larger compensation elsewhere, a right to leave the service upon compensating the master for the damage done to him for the breach. In other words, can he not elect to perform or pay damages. And is there any other remedy than that which the law gives viz: a right of action for damages? Should a court of equity force the servant to remain in the service or remain idle? The ground upon which this jurisdiction is placed by the Pennsylvania court is the familiar one of the legal remedy being inadequate. But if this is so it must be because of the master's neglect in not exacting proper security for the complete performance of the agreement, for to say that the damages cannot be assessed in money is absurd.

The involuntary servitude claim in the federal and in some of the state constitutions has been before the courts in few cases. In Robertson v. Baldwin, 165 U. S. 275, the United States shipping laws punishing by imprisonment, seamen for desertion, absence without leave or the refusing to join a vessel on a voyage for which they have signed articles, was attacked as in violation of the 13th amendment concerning involuntary servitude. The supreme court held that the amendment was not intended to apply to the army the navy or to merchant seamen. The breach of a contract for personal service has not, said the court, being recognized in this country as involving a liability to criminal punishment "except in the cases of soldiers, sailors and probably some others, nor would public opinion tolerate a statute to that effect." In Arthur v. Oakes, 63 Fed. Rep. 31, Mr. Justice Harlan reversed a decree made by a district judge restraining railroad employees from quitting the service of the receivers saying, that to compel one to work for or to remain in the personal service of another was to place him in a condition of involuntary servitude, a condition which the supreme law of the land declares shall not exist within the United States. And in Robertson v. Baldwin, *supra*, the same judge said: "The condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude from the minute he is compelled against his will to continue in such service. He may be liable in damages for the non-performance of his agreement but to require him against his will to continue in the personal service of his master is to keep him in a condition of involuntary servitude."

JOHN D. LAWSON.

JETSAM AND FLOTSAM.

CONSTRUCTION OF MAXIM MOBILIA SEQUUNTUR PERSONAM.

An interesting question, which has been much discussed by writers on international law, but which has not hitherto been adjudicated upon by the courts, was decided by Kekewich, J., in the recent case of *Re* Barnett's Trusts. The facts were extremely simple. A fund in court belonged to a domiciled Austrian who died at Vienna intestate, without heirs or next of kin, and the question arose who was entitled to the fund. The crown claimed it as *bona vacantia*. The Austrian government also claimed it, on a similar ground, as being, according to the law of Austria, confiscated to the state as heiress property. The case was most elaborately argued, and the opinions of English, French, German, and Dutch writers on international law were referred to, especially Voet, Fœlix, and Bar. But the short point was whether the maxim *mobilia sequuntur personam* applied—that is, whether the law of the country of domicile governed the destination of the property. Kekewich, J., held that the maxim in question only applied to the succession and distribution of movables, but here the court was dealing with a case where there was no distribution at all. The crown was not claiming through the *persona*, but was claiming the *glans caduca*—the acorn on the ground and not on the tree, and took the property as *bona vacantia*. The decision, if we may say so, appears to be sound. It is obvious that some limit must be placed to the application of the above-mentioned maxim. The contention on the part of the Austrian government that its application is unlimited and without exception, is clearly fallacious. The maxim is merely a rule of distribution and cannot properly be held to displace sovereign rights. Further, the foundation of international law is reciprocity, and it may be taken as certain that no foreign government under similar circumstances would part with money under its control. If possession is not nine points of the law, it does in many cases confer an advantage on the possessor, and this is just one of those cases where such advantage may be rightly insisted upon.—*Solicitor's Journal.*

BOOKS RECEIVED.

The Barrister, being Anecdotes of the Late Tom Nolan, of the New York Bar. Compiled by

Charles Frederick Stansbury, Author of "Klondike the Land of Gold," etc. Mab Press. 116 Nassau Street, New York, Cloth mo. 300 pages, Price $1.50.

HUMORS OF THE LAW.

A negro man went into Mr. E——'s office for the purpose of instituting a divorce suit against his wife. Mr. E——proceeded to question him as to his grounds for complaint. Noticing that the man's voice failed him, Mr. E——looked up from his papers, and saw that big tears were running down over the cheeks of the applicant for divorce.

"Why," said the lawyer, "you seem to case a great deal for your wife? Did you love her?"

"Love her, sir? I jest analyzed her!"

A good story, but one rather hard upon the profession, is told of a certain dean of Ely. At a dinner, just as the cloth was being removed, the subject of discourse happened to be that of extraordinary mortality among lawyers.

"We have lost," said a gentleman, "not less than seven eminent barristers in as many months."

The dean, who is very deaf, rose just at the conclusion of these remarks and gave the company grace:

"For this and every other mercy, make us devoutly thankful."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

1. APPEAL AND ERROR—Findings of Fact.—In a suit to quiet right to water wherein plaintiffs were improperly nonsuited, the appellate court would not consider findings of fact tendered by them below, where none were tendered by defendants, but would remand the case.—Miller v. Lake Irr. Co., Wash., 67 Pac. Rep. 996.

2. APPEAL AND ERROR—New Trial.—The first grant of a new trial will not be disturbed, unless the verdict was demanded by the law and the evidence.—Merchants' Nat. Bank v. Fouche, Ga., 40 S. E. Rp. 697.

3. APPEAL AND ERROR — Questions Considered.—Where the trial court considered only one question in ordering new trial, the supreme court, on an appeal from the order, will not determine questions not considered by the trial court.—Reno Mill & Lumber Co. v. Westerfield, Nev., 67 Pac. Rep. 961.

4. ATTACHMENT — Possession. — Where plaintiff admits possession on the part of defendant in attachment, it is incumbent on him to explain that possession, in order to show that it is consistent with his claim of title.—People's Nat. Bank v. Harper, Ga., 40 S. E. Rep. 717.

5. BANKRUPTCY—Duty to Institute Suits.—Though a trustee in bankruptcy is not required to litigate every question called to his notice by creditors, he cannot, by requiring indemnity in every instance against costs and expenses, cast the risk of a controversy on the particular creditor requesting him to undertake it. —*In re* Baird, U. S. D. C., E. D. Pa., 112 Fed. Rep. 960.

6. BANKRUPTCY—Exemptions.—While the bankrupt act recognizes the bankrupt's right to exemptions, it refers to the state law as the source from which the right arises, and what the state law does not give can not be set aside as exempt by the trustee.—*In re* Manning, U. S. D. C., E. D. Pa., 112 Fed. Rep. 948.

7. BANKRUPTCY—Individual Petition of Partner.—A firm having failed more than eight years befor a member thereof petitioned individually to be adjudged a bankrupt, and more than nine years before the other partner was cited, without any proof of bankruptcy, rule on the latter to show cause why he and the partship should not be adjudged bankrupt is properly discharged.—Royston v. Weis, U. S. C. C. of App. Fifth Circuit, 112 Fed. Rep. 962.

8. BANKRUPTCY—Intent to Prefer.— Where an insolvent debtor, who has transferred property to his creditors, establishes his want of knowledge as to his insolvency, he rebuts the presumption of an intent to prefer which arises from the fact of insolvency.—*In re* Gilbert, U. S. D. C., D. Oreg., 112 Fed. Rep. 951.

9. BANKRUPTCY—Jurisdiction.—A federal court has not jurisdiction of a plenary suit in equity by a creditor to reach property of his debtor transferred to a corporation which has been adjudged a bankrupt, or to permit him to prove his claim as against such bankrupt corporation.—Real Estate Trust Co. v. Thompson, U. S. D. C., E. D. Pa., 112 Fed. Rep. 945.

10. BANKRUPTCY—Preference.—Where a creditor of a bankrupt who has received a preference does not surrender the preference until after it has been adjudicated that the preference was unlawful, his claim against the bankrupt's estate should be disallowed under Bankr. Act, § 57, cl. "g."—*In re* Greth, U. S. D. C., E. D. Pa., 112 Fed. Rep. 978.

11. BANKRUPTCY—Review of Order Dismissing Proceedings.—When several creditors join in a petition for the reinstatement of bankruptcy proceedings against their debtor, one alone may petition to the court of appeals for review of the order dismissing their petition.—*In re* Jemison Mercantile Co., U. S. C. C. of App., Fifth Circuit, 112 Fed. Rep. 966.

12. BANKS AND BANKING—Liability in Tort.—The cashier of a bank has authority by virtue of his position to receive deposits and to issue certificates with respect thereto, and the bank is liable in tort for false statements therein by which another was directly injured.—Hindman v. First Nat. Bank, U. S. C. C. of App., Sixth Circuit, 112 Fed. Rep. 931.

13. BOARD OF HEALTH—Municipal Affairs.—The board of health created by a charter, and the powers thereby conferred upon them, held to be a municipal affair, superseding any code sections creating a board of health inconsistent therewith.—People v. Williamson, Cal., 67 Pac. Rep. 504.

14. CARRIERS—Connecting Lines.—Under Civ. Code, § 2298, where no contract of freight was entered into between plaintiff and defendant, binding it to transport his goods beyond its line, defendant was not liable for injuries on the connecting line.—Felton v. Central of Georgia Ry. Co., Ga., 40 S. E. Rep. 746.

15. CHATTEL MORTGAGES—Validity of Sale.—Where personalty has been duly advertised for sale on foreclosure by a mortgagee, and execution is levied again

the mortgagor on the property, and, while held by the sheriff, is sold by the mortgagee, the sale is void.—Fulghum v. J. P. Williams Co., Ga., 40 S. E. Rep. 695.

16. CONTRACTS—Determination by Courts.—The trial court must determine whether a warehouse receipt for grain contains the terms under which the grain was delivered, when the pleadings present the issue.—Hirsch v. Salem Flouring Mills Co., Oreg., 67 Pac. Rep. 949.

17. CONTRACTS—Limitation of Liability.—Contract whereby passenger absolved railroad company from liability while riding on freight trains designated to carry passengers held against public policy.—Richmond v. Southern Pac. Co., Oreg., 67 Pac. Rep. 947.

18. CONVICTS—Liability of County.—Under Pen. Code, § 1097, a county is not liable to officers of the court for their fees, where it does not hire out the convicts, but compels them to labor on a chain gang.—Pulaski County v. De Lacy, Ga., 40 S. E. Rep. 741.

19. COPYRIGHTS—Abandonment.—Where the author of a book consents to its publication in serial form in a magazine, whether such magazine is copyrighted or not by its publishers, the author cannot afterwards copyright such parts of the book as were so published.—Mifflin v. Dutton, U. S. C. C. of App., First Circuit, 112 Fed. Rep. 1004.

20. COSTS—Liability of Attorney.—Under Civ. Code, § 5387, an attorney, in bringing a suit in behalf of plaintiffs, some of whom reside in the state and some of whom are non-residents, is not liable for costs, though plaintiffs are cast in the suit.—Berrie v. Atkinson, Ga., 40 S. E. Rep. 708.

21. COURTS — Jurisdiction.—The supreme court held not to obtain jurisdiction of proceedings in error properly cognizable by the court of appeals because such court would pass out of existence before the proceedings could be heard there.—Wood v. O'Hair, Kan., 67 Pac. Rep. 451.

22. CRIMINAL LAW—Commitment.—A person cannot complain that he has been committed for a shorter time than the maximum authorized by law in default of the payment of the fine and costs assessed against him on conviction of a crime.—State v. Towner, Mont., 67 Pac. Rep. 1004.

23. CRIMINAL LAW—Disagreement as to Evidence.—Where, pending an argument, counsel disagreed as to the testimony, and the judge refused to have the stenographer read the evidence, there is not cause for new trial, when the question was left to the jury.—Palmer v. State, Ga., 40 S. E. Rep. 717.

24. CRIMINAL LAW — Habeas Corpus.—Where petitioner, under an information charging him with grand larceny, pleaded guilty of petit larceny, and such plea was accepted, a judgment of conviction of grand larceny, because he had previously been convicted of petit larceny, and sentenced to the penitentiary, was void, and he should be discharged on *habeas corpus*.—Bandy v. Hehn, Wyo., 67 Pac. Rep. 979.

25. CRIMINAL LAW — Immaterial Error.—Allowing a witness on a criminal prosecution to be asked whether defendant showed any curiosity as to why he was arrested was not such material error as was prejudicial to defendant.—State v. Norris, Wash., 67 Pac. Rep. 983.

26. CRIMINAL LAW—Larceny.—Under a statute providing that, on a second conviction of petit larceny, the punishment shall be that prescribed for grand larceny, the former conviction enters into the offense, and must be alleged in the information and proved, or the greater penalty cannot be imposed.—Bandy v. Hehn, Wyo., 67 Pac. Rep. 979.

27. CRIMINAL LAW—Larceny.—In a prosecution for stealing a steer, the principal testimony being that of an accomplice, the refusal of the court to charge that the fact that the hide and brand were found buried where he said defendant buried them was not corroboration held error.—Smith v. State, Wyo., 67 Pac. Rep. 977.

28. CRIMINAL LAW — Larceny.—Where by a prearranged plan accused and his associates were to commit a larceny and sell the property, possession of the property by the associates pursuant to the criminal purpose may be properly considered against accused.—State v. Stevenson, Mont., 67 Pac. Rep. 1001.

29. CRIMINAL LAW—Venue.—Proof that an act was committed in a certain county will sustain an allegation that it was committed in that county, and the courts of the territory will take judicial notice that such county is in the territory.—Filson v. Territory, Okla., 67 Pac. Rep. 478.

30. DAMAGES—Evidence.—Under a complaint sustained by proof that defendant delivered a part of lumber lightered from a vessel and failed to deliver the rest, an instruction on the measure of plaintiff's damages held erroneous, in absence of proper evidence.—Carroll v. Caine, Wash., 67 Pac. Rep. 993.

31. DEEDS—Breach of Condition.—Where a grantor conveyed land in fee for church purposes, upon condition that, if its use for such purposes was discontinued, it should revert to him, his heirs and assigns, and the condition was not broken in his lifetime, he had no interest in the land which could pass either by will or inheritance.—Methodist Protestant Church of Henderson v. Young, N. Car., 40 S. E. Rep. 691.

32. DESCENT AND DISTRIBUTION—Action by Heirs.—Heirs of intestate cannot sue for land belonging to the state, unless they allege that there has been no administration, or that administrator has been discharged, or, if in office, has consented to the bringing of the suit.—Crummey v. Bentley, Ga., 40 S. E. Rep. 765.

33. DIVORCE—Alimony.—Where a divorced wife remarried, an order relieving defendant in divorce from permanent alimony accruing subsequent to decree, and from further alimony, held proper.—Brandt v. Brandt, Oreg., 67 Pac. Rep. 508.

34. DIVORCE—Insanity.—Suit for divorce under Civ. Code, §§ 92, 107, may be maintained against an insane person for desertion, where such desertion continued for a year before he became insane.—Harrigan v. Harrigan, Cal., 67 Pac. Rep. 506.

35. EASEMENTS—Prescription.—A use under a mere license will not ripen into an easement by prescription.—Phœnix Ins. Co. v. Haskett, Kan., 67 Pac. Rep. 446.

36. EQUITY—Mistake.—Complainant, who by mistake had followed procedure of wrong statute in redeeming from execution sale, held entitled to relief in equity.—MacKay v. Smith, Wash., 67 Pac. Rep. 982.

37. EVIDENCE—At Former Trial.—The testimony of a witness at a former trial, preserved by an official stenographer, is admissible, where the witness is out of the jurisdiction of the court.—Atchison, T. & S. F. R. Co. v. Osborn, Kan., 67 Pac. Rep. 547.

38. EVIDENCE — A Preponderance of Evidence.—Though plaintiff's testimony stands alone and is wholly contradicted by defendant, a contention that plaintiff has not made out a case by a preponderance of the evidence is without merit.—Murphy v. De Haan, Iowa, 89 N. W. Rep. 100.

39. EVIDENCE—Certified Copy of Deed.—In order to render a certified copy of a deed admissible, the party must show due execution of the original, its loss, and that the paper is a substantial copy thereof.—Crummey v. Bentley, Ga., 40 S. E. Rep. 765.

40. EVIDENCE — Decedent's Will Not Admissible to Prove Genuineness of Notes.—In an action against executors to recover on notes the genuineness and consideration for which were questioned, decedent's will was not admissible in evidence.—Hoag v. Wright, 74 N. Y. Supp. 1069.

41. EVIDENCE—Hearsay.—A letter from the commissioner of the general land office held hearsay evidence as to land being in a grant to a railread.—Wilbur v. Cedar Rapids & M. R. Ry. Co., Iowa, 89 N. W. Rep. 101.

42. EVIDENCE—Incompetency.—In an action against a guarantor evidence of a conversation between the principal debtor and the agent of the obligee, when such guarantor was not present, was incompetent and properly stricken out.—New Home Sewing Mach. Co. v. Simon, Wis., 89 N. W. Rep. 144.

43. EVIDENCE — Prior Oral Agreement.—In an action on a lease, evidence of an oral agreement between the parties, before the execution of the lease, for repairs and subletting, held properly excluded.—Smith v. Smull, 74 N. Y. Supp. 1061.

44. EXCEPTIONS, BILL OF — Certification by Judge.—It was the duty of judge to certify true bill of exceptions, without requiring counsel to eliminate therefrom all reference to and the action taken by certain exceptions to acts of judge.—Strickland v. Fite, Ga., 40 S. E. Rep. 768.

45. EXECUTIONS — Action to Recover Land.—Though judgment has been rendered on a debt, and execution issued and sale made of land, the judgment creditor to whom the land had been conveyed as security for the debt can sue to recover the same from the execution purchaser.—Parker v. Home Mut. Building & Loan Assn., Ga., 40 S. E. Rep. 724.

46. EXECUTORS AND ADMINISTRATORS — Equity Powers of Surrogate Court.—An order of the surrogate's court directing the payment of money in pursuance of an agreement held void as an exercise of equity power.—*In re* Bronson's Estate, 74 N. Y. Supp. 1052.

47. EXECUTORS AND ADMINISTRATORS — Liquidated Claims.—That the executor may be directed by the surrogate to pay a claim of a creditor of the estate, the claim must be liquidated by an accounting of decedent's acts.—*In re* Walker's Estate, 74 N. Y. Supp. 971.

48. EXEMPTIONS—Burden of Proof.—In a suit against an officer to recover property levied on by him, the burden is on plaintiff to show that it is exempt, and that he has asserted his rights under the law.—Gilewicz v. Goldberg, 74 N. Y. Supp. 984.

49. EXEMPTIONS—Failure to Claim.—Under Code Civ. Proc. § 1391, an exemption is a privilege, and must be claimed before sale on execution, or will be waived.—Gilewicz v. Goldberg, 74 N. Y. Supp. 984.

50. FEDERAL COURTS—Following State Decisions.—A federal court is not bound to follow the decision of the supreme court of a state, construing a state statute relating to the liability of stockholders, where the transaction before it, upon which liability is asserted, occurred prior to such construction.—Brunswick Terminal Co. v. National Bank of Baltimore, U. S. C. C., D. Md., 112 Fed. Rep. 812.

51. FIXTURES — Removal by Tenant. — A servant's room, metallic gutters attached to the roof, and water pipes laid under the ground, cannot be removed by a tenant against the will of the landlord.—Wright v. DuBignon, Ga., 40 S. E. Rep. 747.

52. FIXTURES — Tests. — In determining whether or not personal property becomes a fixture, the tests are —First, annexation to the realty; second, application to the use of that part of the realty to which it is attached; third, the intention of the party making the annexation.—Dodge City Water & Light Co. v. Alfalfa Irrigation & Land Co., Kan., 67 Pac. Rep. 462.

53. FORCIBLE ENTRY AND DETAINER—Homestead Entries.—Forcible entry and detainer is the appropriate remedy to recover lands from a settler without color of title, to which plaintiff has the right of possession. —Cope v. Braden, Okla., 67 Pac. Rep. 475.

54. FRAUDS, STATUTE OF—Measure of Compensation. —In an action for labor performed under a parol contract within the statute of frauds, the contract governs as to the rate of compensation.—Murphy v. De Haan, Iowa, 89 N. W. Rep. 100.

55. GAS — Damages for Killing Plaintiff's Trees. — Where, in an action for killing plaintiff's grass and trees by escaping gas, there is evidence that the trees probably died from other causes, a new trial should not be granted because the verdict is less than the uncontradicted testimony as to his total loss.—Ranck v. Cedar Rapids Gas Co., Iowa, 89 N. W. Rep. 88.

56. GIFTS — Recovery Before Delivery. — Where the owner of money deposits it with another, to be delivered as a gift to a third person, at any time before actual delivery and acceptance by him, he can recover the money.—Smith v. Peacock, Ga., 40 S. E. Rep. 757.

57. GUARANTY—Persons Bound. — Under Civ. Code, § 3650, a guarantor of a note held exonerated when the principal debtor's note is canceled as paid; the creditor accepting the note of another person in payment. —Stanford v. Coram, Mont., 67 Pac. Rep. 1005.

58. HABEAS CORPUS—Vacation Order.—*Certiorari* will not lie to review a vacation order of a circuit judge remanding to jail one brought before him by *habeas corpus* proceedings; the applicant having an adequate remedy under Rev. St. 1898, § 3043.—*In re* Hammer, Wis., 89 N. W. Rep. 111.

59. HOMESTEAD—Leasehold.—Where a married man, with his family, occupies a house under a five-year lease, such premises constitute his homestead, under Rev. Stat. 1898, § 2983.—Beranek v. Beranek, Wis., 89 N. W. Rep. 146.

60. HOMESTEAD—Non-Residence.—Where a man who had lived in Wyoming nearly 30 years died therein, leaving a homestead, his surviving wife, who had never been in the state or lived with him during that time, should not be considered a resident of the state or occupant of such homestead. — Ullman v. Abbott, Wyo., 67 Pac. Rep. 467.

61. HOMESTEAD—Right to Claim the Exemption.—A homestead claimant, whose wife is dead and whose children have become of age and moved away, and who has no one living with him as a member of his family, cannot retain his homestead exemption.—Ellinger v. Thomas, Kan., 67 Pac. Rep. 529.

62. HOMICIDE—Mitigation. — The fact that one had been told that another had spoken slanderous words of a member of his family will not justify the former in killing the latter, or reduce the killing below the grade of murder.—Perryman v. State, Ga., 40 S. E. Rep. 746.

63. HUSBAND AND WIFE — Assumption of Husband's Debt.—Where a wife purchases property from the husband, which is incumbered, the agreement by the wife to pay such incumbrance held not an assumption by her of her husband's debt, such as is prohibited by law.—Lowenstein v. Meyer, Ga., 40 S. E. Rep. 726.

64. HUSBAND AND WIFE—Separate Maintenance.—The abandonment need not continue for one year, or for any fixed time, to entitle the wife to separate maintenance.—Schonborn v. Schonborn, Wash., 67 Pac. Rep. 987.

65. INFANTS—Action for Slander.—An infant may by his next friend maintain an action for slander.—Hurst v. Goodwin, Ga., 40 S. E. Rep. 764.

66. INJUNCTION — Concurrent Jurisdiction.— A temporary injunction will not be granted, where the court understands that another court with concurrent jurisdiction has full charge of the controversy and has refused such injunction.—Dady v. Georgia & A. Ry. Co., U. S. C. C., E. D. Ga., 112 Fed. Rep. 838.

67. INJUNCTION—Restraining Penal Action.—The fact that no appeal would lie from decision of justice in an action for penalty for failing to satisfy mortgage, because of smallness of amount involved, held not ground for enjoining the action pending suit to foreclose the mortgage.—Home Savings & Trust Co. v. Hicks, Iowa, 89 N. W. Rep. 103.

68. INSANE PERSONS — Capacity to Sue.— One very weak in mind, but with enough capacity to understand the nature of a particular act, and with will enough to desire to bring suit thereon, may do so without a next friend or guardian.—Calhoun v. Mosley, Ga., 40 S. E. Rep. 714.

69. INSURANCE—Breach of Warranty.—Membership in fraternal societies which pay funeral expenses and a small sum to the widow or legal heirs, but issue no policy, held not a breach of warranty in an application for life insurance that insured carries no life insurance.—Seidenspinner v. Metropolitan Life Ins. Co., 74 N. Y. Sup. 1008.

70. INSURANCE—Change of By-Laws.—An alteration in the by-laws of a beneficial association as to the designation of beneficiaries held not to change the *status* of a deceased member, who was incapacitated by insanity from complying therewith.—Grossmayer v. District No. 1, Independent Order of B'nai Brith, 74 N. Y. Supp. 1057.

71. INSURANCE—Complaint Held Demurrable.—Complaint in action on employer's liability policy held demurrable for want of facts.—Todd v. Union Casualty & Surety Co., 74 N. Y. Sup. 1062.

72. INSURANCE — Construction of Bond.—Where an employee's surety bond is susceptible to two constructions, one favorable and the other unfavorable to the insurance company, the latter, if consistent with the object for which the contract was made, must be adopted.—Remington v. Fidelity & Deposit Co., Wash., 67 Pac. Rep. 989.

73. INSURANCE—Divorce Beneficiary.—Divorced wife of member of fraternal order, named as beneficiary in benefit certificate, held entitled to benefit fund on his death; he not having changed the beneficiary in any way.—Courtois v. Grand Lodge of A. O. U. W. of California, Cal., 67 Pac. Rep. 970.

74. INSURANCE—Expulsion of Members.—An expulsion of a member from a fraternal insurance society must be made in accordance with its rules and constitution; otherwise it is null and void.—Woodmen of the World v. Gilliland, Okla., 67 Pac. Rep. 455.

75. INSURANCE.— Material Question.—An agreement by an applicant for insurance that he had no other pending proposition or negotiation for insurance is on a material matter and will be enforced.—Home Life Ins. Co. v. Myers, U. S. C. C. of App., Eighth Circuit, 112 Fed. Rep. 846.

76. INSURANCE— Objection by Reinsurer.— Reinsurer held not entitled to object to settlement of insurer with the insured, in absence of allegation and proof of fraud and collusion to its injury.—Insurance Co. of State of New York v. Associated Manufacturers' Mut. Fire Ins. Co., Supp., 74 N. Y. 1038.

77. INSURANCE—Ultra Vires.—That the act of a beneficial society in making a certificate payable to the brother of the insured was *ultra vires* was not available to the administratrix of the insured, but only to the society. Markey v. Supreme Council, Catholic Benev. Legion, 74 N. Y. Supp. 1069.

78. JUDGMENT—Failure to Intervene.—One who has full knowledg of the pendency of an action, and makes no effort to intervene, cannot, after judgment for plaintiff, sue to restrain its enforcement.—Fitzgerald v. Bowen, Ga., 40 S. E. Rep. 735.

79. JUDGMENT — Opening Default.— Bond given to open default held to bind defendants, on judgment being rendered for plaintiff by court of appeals on appeal stipulating for judgment absolute, though defendants had judgment below.—Caponigri v. Cooper, 47 N. Y. Supp. 1116.

80. JUDGMENT—Res Judicata.—A judgment against a tenant's surety for rent, though rendered by default, is *res judicata* in a second action for rent upon any defense which the surety might have interposed in the first action.—Phipps v. Oprandy, 74 N. Y. Supp. 985.

81. JURY—Uncontradicted Evidence.—Positive testimony to a fact entitling defendant to verdict being uncontradicted and unimpeached, there is no question for the jury.—Trudden v. Metropolitan Life Ins. Co., 74 N. Y. Supp. 1083.

82. LANDLORD AND TENANT—Rescission of Contract.—Where the premises are abandoned by a tenant, that the landlord allows other parties to occupy them temporarily without rent is not a rescission of the contract of rental.—Hardison Whiskey Co. v. Lewis, Ga., 40 S. E. Rep. 702.

83. LANDLORD AND TENANT—Set-off Against Rent.—Where a tenant paid the tax reserved on rents, under the compulsory process provided by Laws 1896, ch. 908, § 75, with the acquiescence of the landlord, his right to set-off the amount against his rent could not be resisted by the landlord on the ground that the statute was unconstitutional — Woodruff v. Oswego Starch Factory, 74 N. Y. Supp. 961.

84. LARCENY — Grade of Offense.—The reasonable market value of stolen property determines the grade of larceny.—Filton v. Territory, Okla., 67 Pac. Rep. 473

85. MUNICIPAL CORPORATIONS — Liability of Bonding Company.—A guaranty company held not liable under the original bond to city for any loss not discovered for more than six months after its expiration, though discovered within six months of the dismissal of the city treasurer, and during the continuance of a subsequent bond.—City of Brunswick v. Harvey, Ga., 40 S. E. Rep. 754.

86. LIBEL AND SLANDER — Allegations in Pleading.—Allegations in a pleading which are relevant and pertinent to the issues are absolutely privileged, and cannot be made the ground of an action for libel.—McGehee v. Insurance Co. of North America, U. S. C. C. of App., Fifth Circuit, 112 Fed. Rep. 853.

87. LIBEL AND SLANDER — Pleading.—Where allegations of a complaint for slander contained in two different causes of action shows that the slanderous words were spoken in the same conversation, defendant is entitled, on motion, to have the petition made more definite.—Thompson v. Harris, Kan., 67 Pac. Rep. 456.

88. LIFE INSURANCE — Acceptance of Application.—A mutual life insurance company held bound by the written, but erroneous, statement of its secretary to an applicant that this application had been accepted and that a policy would be issued, where the secretary retained the premium and the applicant died before he knew of the real facts.—Moulton v. Masonic Mut. Ben. Soc., Kan., 67 Pac. Rep. 533.

89. LIFE INSURANCE—Waiver of Objection.—Where a fraternal order files a bill of interpleader, and deposits in court the amount payable under a beneficiary certificate, it thereby waives any objection to the right of the person named as beneficiary in the certificate to take as such.—Taylor v. Hair, U. S. C. C., D. Oreg., 112 Fed. Rep. 913.

90. LIMITATION OF ACTIONS — Admissions.—Statements in a letter to the writer's creditor held not sufficient admissions to remove the bar of limitations.—Liberman v. Gurensky, Wash., 67 Pac. Rep. 998.

91. LIMITATION OF ACTIONS—Fraud.—Where defendant induced plaintiff to sign a deed of land to him, she supposing it to be a power of attorney, an action for relief is not barred until two years after the discovery of the deception.—Kahm v. Klaus, Kan., 67 Pac. Rep. 542.

92. MANDAMUS—Bill of Exceptions.—Where judge refuses to certify bill of exceptions in all respects true, *mandamus* will issue to compel such action.—Strickland v. Fite, Ga., 40 S. E. Rep. 763.

93. MASTER AND SERVANT — Assumption of Risk.—A servant may be justified in remaining in the employment for a reasonable length of time without being held to have assumed the risk from obvious dangers which render the place where he works unsafe, where the master's superintendent in charge of the work has promised to make structural changes which will lessen the danger, whether the superintendent has authority in fact to make such changes or not.—Barney Dumping Boat Co. v. Clark, U. S. C. C. of App., Second Circuit, 112 Fed. Rep. 921.

94. MASTER AND SERVANT—Contributory Negligence.—In an action against a master for injuries received by a 16 year old employee, the question of whether plaintiff was guilty of contributory negligence held for the jury.—O'Connor v. Golden Gate Woolen Mfg. Co., Cal., 67 Pac. Rep. 966.

95. MASTER AND SERVANT — Laborer's Lien.—A bartender, who is also required to keep books, is a laborer, within the statute creating a lien in favor of laborers on the property of their employers.—Lowenstein v. Meyer, Ga., 40 S. E. Rep. 726.

96. MASTER AND SERVANT—Negligence.—In an action to recover for the negligent killing of one who was employed under an engine as a klinker puller, a charge as to defendant's liability for not avoiding the injury after knowledge of deceased's negligence and perilous situation considered, and held not erroneous.—Morbey v. Chicago N. W. Ry. Co , Iowa, 89 N. W. Rep. 105.

97. MINES AND MINERALS — Location Certificate.—Where it is shown that a mining claim has been located in good faith, if language used in referring to natural objects and permanent monuments will impart notice to a subsequent locator, it is sufficient.—Morrison v. Regan, Idaho, 67 Pac. Rep. 955.

98. MUNICIPAL CORPORATIONS — Vacation of Plat.—A street should not be vacated, with a plat; the owner of lots on one side of it not having so requested.—Sarvis v. Caster, Iowa, 89 N. W. Rep. 84.

99. NAVIGABLE WATERS — Accretions.—Under Civ. Code, § 1016, island which formed in navigable stream, and which by reason of accretions gradually joined the mainland, held to belong to the state and its grantees.—Glassell v. Hansen, Cal., 67 Pac. Rep. 964.

100. PARTIES—Defect of Parties Defendant.—A plea in abatement for defect of parties defendant, alleging that 256 persons, are necessary, does not show that it is impracticable to bring all such persons into the suit.—Castle v. City of Madison, Wis., 89 N. W. Rep. 156.

101. PARTIES — Misjoinder.—Where plaintiff sued individually and as assignee, but is entitled to recover in only one capacity, objection to the misjoinder of parties cannot be raised by demurrer.—Hornish v Ringen Stove Co., Iowa, 89 N. W. Rep. 95.

102. PARTITION—Exceeding Powers.—Where arbitrators appointed to partition certain real estate intermingle in their award a determination of the rights of the parties in other property, the award must be set aside, under Rev. St. 1898, § 3552, subd. 4.—Frankfurth v. Steinmeyer, Wis., 89 N. W. Rep. 148.

103. PATENTS — Damages for Infringement.—Where, but for the patented feature, an article made and sold by an infringer would not be a salable commodity, the patentee is entitled to the whole profit obtained from such article.—Coddington v. Propfe, U. S. C. C., E. D. Pa., 112 Fed. Rep. 1016.

104. PAYMENT—Pleading.—A complaint for wages held not objectionable for not stating that the amount earned has not been paid.—Meating v. Tigerton Lumber Co., Wis., 89 N. W. Rep. 152.

105. PERPETUITIES — Suspension of Alienation.—A provision in a will devising real estate in trust, providing that it shall not be conveyed for 21 years, is not an unlawful suspension of alienation, within Rev. St. § 2039.—*In re* Kopmeier, Wis., 89 N. W. Rep. 134.

106. PHYSICIANS AND SURGEONS — Burden of Proof in Malpractice.—In a suit for damages for death caused by malpractice, the burden is on plaintiff to show want of skill and due care, and that the injury resulted therefrom.—Georgia Northern Ry. Co. v. Ingram, Ga., 40 S. E. Rep. 708.

107. PLEDGES—Certificate of Stock.—The transfer of a certificate of stock as collateral for a note, with power to sell on default, is a pledge, and not a mortgage thereof.—Irving Park Assn. v. Watson, Oreg., 67 Pac. Rep. 945.

108. PRINCIPAL AND AGENT — Agent's Authority.—Where person dealing with agent according to business usages is justified in presuming that the agent has authority to do a particular act, the principal is estopped to deny that the agent has such authority.—Lebanon Sav. Bank v. Henry, Neb., 89 N. W. Rep. 169.

109. PRINCIPAL AND AGENT — Authority of Agent.—Ostensible authority to act as agent may be inferred, if the party to be charged as principal affirmatively, intentionally, or by lack of ordinary care allows third persons to act on such apparent agency.—Faulkner v. Simms, Neb., 89 N. W. Rep. 171.

110. PRINCIPAL AND AGENT—Declarations of Agent.—Statements of agent, not made in presence of principal or brought to her notice, and not being within the scope of his contract, held inadmissible.—People's Nat. Bank v. Harper, Ga., 40 S. E. Rep. 717.

111. PRINCIPAL AND SURETY — Application of Collateral.—A surety on a note has the right to insist on the performance of an agreement made between the principal and payee that the proceeds of collateral security held by the latter shall be applied on such note, rather than upon other indebtedness of the principal for which the surety is not ,bound.—Brown v. First Nat. Bank, U. S. C. C. of App., Seventh Circuit, 112 Fed. Rep. 901.

112. RAILROADS — Unavoidable Accident.—Where a horse suddenly rushed against a locomotive while it was passing over a public crossing, and was killed, the company was not liable because its servants did not observe the requirements of the blowing and checking law.—Georgia & A. Ry. Co. v. Cook, Ga., 40 S. E. Rep. 718.

113. REFORMATION OF INSTRUMENTS—Mutual Mistake.—The denial of the defendant of the existence of a mutual mistake in a contract is not sufficient to defeat the claim of the other party for reformation, but in such case he must clearly show a real agreement, which the written contract fails to express or violates.—Fulton v. Colwell, U. S. C. C. of App., Third Circuit, 112 Fed. Rep. 881.

114. REPLEVIN—Proof of Title.—An affidavit of defense, in replevin, that defendant in possession of the goods as a carrier, and received them from another than plaintiff, and does not know who is owner, is sufficient to put plaintiff to proof of ownership.—Uncapher v. Baltimore & O. R. Co., U. S. C. C., E. D. Pa., 112 Fed. Rep. 899.

115. SALES—Cancellation of Order.—Where an agent, obtains an order for goods by fraudulent representations, sending an order to him to cancel the same is insufficient to effect a rescission.—Smith v. Columbia Jewelry Co., Ga., 40 S. E. Rep. 735.

116. TAXATION—Right to Construe Will.—In a proceeding for the appraisal of a testator's property under the transfer tax act, the court has jurisdiction to construe testator's will.—*In re* Peters' Estate, 74 N. Y. Supp. 1028.

117. TRIAL—Evidence.—There being two issues, one of agency in fact and the other of apparent agency, evidence though bearing on only one, is properly admitted.—Domasek v. Kluck, Wis., 89. N. W. Rep. 139.

118. TRIAL—Failure to Disclose the Purpose of Evidence.—Where counsel does not disclose the purpose of offered evidence, and admits that it is not the best evidence, it is not reversible error to reject it, even though it is competent.—Seidenspinner v. Metropolitan Life Ins. Co., 74 N. Y. Supp. 1108.

119. TRIAL—Failure to Object.—Where incompetent evidence is received without objection, a motion to strike out is properly denied.—Lindemann v. Brooklyn Heights R. Co., 74 N. Y. Supp. 988.

120. TRIAL—Inconsistent Findings.—Where special findings material to the issue are in harmony with a general verdict for plaintiff, it is error to award judgment for defendant on findings collateral to the issue.

—Citizens' Nat. Bank v. Larabee, Kan., 67 Pac. Rep. 546.

121. TRIAL—Instructions.—Where a case is submitted to the jury on a special verdict, it is error to tell them the legal effect of their answer on the question of contributory negligence.—Gerrard v. La Crosse City Ry. Co., Wis., 89 N. W. Rep. 125.

122. TRIAL—Instructions.—Where, in an action on a contract of guaranty, there were no instructions requested by counsel, or complaint made of those given, except one, which followed the decision of the supreme court on a former appeal, error assigned because the court did not fully instruct the jury cannot be sustained.—New Home Sewing Mach. Co. v. Simon, Wis., 89 N. W. Rep. 144.

123. TROVER AND CONVERSION — Evidence.—Refusal by the agent of the vendee of a flock of sheep to search for a portion thereof which was lost held not to conclusively show a refusal on the part of the vendee to accept such portion of the flock.—Tim Kinney & Co. v. First Nat. Bank, Wyo., 67 Pac. Rep. 471.

124. TRUSTS—Establishment.—In a suit to have a resulting trust declared of property purchased by the committee of a lunatic, title thereto being taken in her own name, and not in the lunatic's, plaintiffs must prove that all of the consideration belonged to the lunatic.—Storm v. McGrover, 74 N. Y. Supp. 1032.

125. USURY—Intent.—A note providing for interest at 10 per cent. per annum before and after judgment, where there is no evidence of a corrupt intent to receive an unlawful rate of interest, is not a usurious contract.—Anderson v. Creamery Package Mfg. Co., Idaho, 67 Pac. Rep. 493.

126. USURY—Renewal Note.—A renewal note for one due may include as principal accrued interest remaining unpaid.—Stanford v. Coram, Mont., 67 Pac. Rep. 1005.

127. VENDOR AND PURCHASER—Bona Fide Purchaser.—Obligee in bond for title having paid purchase money notes to the holder, he had a complete equity in the land, both against the vendor and one to whom he had conveyed the land after the execution of the bond.—Georgia State Building & Loan Assn. v. Faison, Ga., 40 S. E. Rep. 760.

128. VENDOR AND PURCHASER — Evidence. — In an action on a contract of a father to convey a farm to a son, plaintiff's case need only be established by a fair preponderance of the evidence.—Hutton v. Doxsee, Iowa, 87 N. W. Rep. 79.

129. VENDOR AND PURCHASER — Land Contract. — Where a contract for the sale of land binds the purchaser to pay all taxes and assessments, and he makes such payment, he can recover the same from the vendor on establishing the inability of the vendor to convey title.—Missouri, K. & T. Ry. Co. v. Pratt, Kan., 67 Pac. Rep. 464.

130. VENUE—Action for Conversion Against an Officer.—An action for conversion, if against an officer who acted by virtue of his office, must be tried in the county where the cause of action arose, as required by Code Civ. Proc. § 983, subd. 2.—Murphy v. Callan, 74 N. Y. Supp. 1009.

131. WATERS AND WATER COURSES—Necessary Parties.—Under Rev. St. 1898, §§ 2602 2604, riparian owners on a lake are necessary parties defendant in a suit for the abatement of a dam at the outlet of the lake, where they claim to have acquired a prescriptive right to have the artificial level of the lake created by the dam maintained.—Castle v. City of Madison, Wis., 89 N. W. Rep. 156.

132. WATERS AND WATER COURSES — Suit to Quiet Right.—In a joint suit by several landowners to quiet right to water for irrigation, the fact that plaintiffs held their lands in severalty held immaterial, and that hence there was no such variance between evidence and declaration as justified a nonsuit.—Miller v. Lake Irr. Co., Wash., 67 Pac. Rep. 996.

133. WILLS—Construction.—A devise of realty to one for life, and "at his death" to his children and grandchildren, held to vest the estate at the death of the life tenant, there being then no grandchildren, in his children born during his life, to the exclusion of a grandchild born after his death.—Akerman v. Akerman, N. H., 51 Atl. Rep. 252.

134. WILLS—Construction.—A will construed as giving a remainder-man of all the property mentioned therein and then owned by the testatrix, and whose life tenant under the will died before testatrix, no part of certain after-acquired property which the remainder-man claimed under Code, art. 93, § 321.—Bourke v. Boone, Md., 51 Atl. Rep. 396.

135. WILLS — Cutting Down an Estate Previously Given.—Where an estate is given in one part of a will in decisive words, it cannot be cut down by subsequent words unless equally decisive.—*In re* Peters' Estate, 74 N. Y. Supp. 1028.

136. WILLS—Mental Incapacity. — Evidence of testator's incapacity, offered by the caveator of a will, must be confined to the time of the execution of the will; but evidence on the part of the caveatee may cover any period of time before or after the execution of the will.—Jones v. Collins, Md., 51 Atl. Rep. 898.

137. WILLS—Residuary Devise.—A devise of all the residue of testator's realty, described as one sixth interest in certain property, held to pass after-acquired interest therein.— Williams v. Brice, Pa., 51 Atl. Rep. 876.

138. WILLS — Testamentary Capacity.— A testator, believing and acting on information received from neighbors, held not possessed of an insane delusion.—Skinner v. Lewis, Oreg., 67 Pac. Rep. 951.

139. WILLS—What Law Governs.—A will is governed by the law in force at testator's death, and not at its execution.—*In re* Kopmeier, Wis., 89 N. W. Rep. 134.

140. WITNESSES — Communication with Physician Waived.—Under Code Civ. Proc. § 836, the heirs of a deceased patient, in a proceeding to set aside the probate of his will, have the right to examine a physician as to facts obtained while attending the deceased professionally.—Pringle v. Burrows, 74 N. Y., Supp. 1055.

141. WITNESSES — Impeachment. — It is proper to show, on cross-examination of a witness for the prosecution, that he entertained hard feelings towards the defendant.—People v. Milks, 74 N. Y. Supp. 1042.

142. WITNESSES — Instruction to Jury.—On a prosecution for rape, an instruction held erroneous for requiring the jury to disregard all the testimony of a witness who had testified falsely in part, unless fully and strongly corroborated.—Lanphere v. State, Wis., 89 N. W. Rep. 128.

143. WITNESSES—Memorandum.— One who, immediately after his conversation with another, makes a memorandum of it and the next day has it copied, and signs the copy, and sends it as a report to his superior officer, may refresh his recollection by referring to such copy.—Edwards v. Gimbel, Pa., 51 Atl. Rep. 357.

144. WITNESSES—Testimony.—Testimony is no part of record, unless made so by bill of exceptions.—Edwards v. Gimbel, Pa., 51 Atl. Rep. 357.

145. WITNESSES—Unskilled Practice.—The cross-examination of a physician, sued for unskillful practice, as to whether he had a licence, held not improper, on the ground that he was not required to procure a license, because of practice in the State before the act requiring license.—Challis v. Lake, N. H., 51 Atl. Rep. 260.

146. WORK AND LABOR—Quantum Meruit.—Architect held not entitled to recover on a *quantum meruit* for work done under contract, after having been expressly directed not to do such work.—De Prosse v. Royal Eagle Distilleries Co., Cal., 67 Pac. Rep. 502.